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91-1227

Supreme Court, U.S.
FILED
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

MIRIAM DONNER,

Petitioner,

vs.

APPALACHIAN INSURANCE COMPANY, a Rhode Island corporation, CITY OF MIAMI, VERNON HETHERINGTON, FOWLER, WHITE, BURNETT, HURLEY, BANICK & KNIGHT, P.A. a/k/a FOWLER, WHITE, BURNETT, HURLEY, BANICK & STRICKROOT, P. A., a Florida professional association, PHILLIP W. KNIGHT, and MICHAEL J. MURPHY,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

PETITION FOR WRIT OF CERTIORARI

Miriam Donner,
in proper person
P. O. Box 1232
Hallandale, Fla. 33008

QUESTIONS PRESENTED FOR REVIEW

1. May a state court dismiss with prejudice federal [42 U.S.C. §1983 and 18 U.S.C. §1964(c)] claims solely in reliance upon its own state-law-based rule of immunity for litigation-related misconduct?

2. Are a municipality, its officer, insurer, and counsel "absolutely immunity" under 42 U.S.C. § 1983 for conspiring under color of state law to conceal, and withhold production of, information and public records, requested in state-court-litigation pretrial discovery, by fraudulently responding that the information and records do not exist and in furtherance of that conspiracy also denying the right of access to those public records in defiance of an extrajudicial demand (under a state "public records" law) for access thereto?

3. Does any such immunity exist under 18 U.S.C. § 1964(c) (RICO)?

4. Did the complaint state § 1983 and RICO claims by alleging that the said conspiracy was under color of state law, that the false discovery responses were served by mail over a period of several years in a state-court damage suit for false arrest, federal civil rights violations, etc., that the fraud was concealed for over ten years, and that the conspiracy prejudicially interfered in that suit with plaintiffs' (First and Fourteenth Amendment) right of access to the court, delayed for ten years the progress of that suit, caused loss of relevant evidence, faded memories of witnesses, added expense and mental anguish and also prejudiced her claims against other defendants?

5. Did the lower court err in dismissing the complaint with prejudice without even one opportunity to amend?

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OPINION BELOW

The opinion of the District Court of Appeal of Florida, Third District, is reported as Donner v. Appalachian Insurance Co., 580 So.2d 797 (1990) and is reprinted at pages 1-4 of the appendix, post. That is the only reported opinion in this case. Various other, unreported orders of the trial court, the Third District, and the Florida Supreme Court are reprinted at pages 5-11 of the appendix.[1]

CONCISE JURISDICTIONAL STATEMENT

The District Court of Appeal of Florida entered judgment May 7, 1991. Rehearing was denied July 3, 1991. That judgment includes legal reasoning with citation of authorities "which [The Florida Star v. B.

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[1] The names of all parties appear in the caption of the case. There are no parent or subsidiary companies.

J.F., 530 So. 2d 286 (Fla. 1988) has held] is subject to discretionary review by the [Florida] state court of last resort" as contemplated by Sup. Ct. R. 13.1. The "state court of last resort," the Florida Supreme Court, denied a petition for discretionary review of that judgment on October 29, 1991. This petition was timely filed "within 90 days after the order denying discretionary review." Jurisdiction of this Court to review that judgment is invoked under 28 U.S.C. Sec. 1257 (a).

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const., amend. I, U.S. Const., amend XIV, sec. 1, 42 U.S.C. sec. 1983, 18 U.S.C. sec. 1961 (1970) (amended 1984, 1986, 1988, and 1989), 18 U.S.C. sec. 1962 (1970) (amended 1988), 18 U.S.C. sec. 1964(c), and 18 U.S.C. sec. 1341 (1970) (amended 1988), involved in this case, are

quoted, in pertinent part, at pages 12-17 of the appendix.

STATEMENT OF THE CASE

Petitioner Donner seeks review of a Florida state appellate court affirmance of a judgment of dismissal with prejudice, granting defendants' motions to dismiss the complaint in Case No. 89-37625. Donner, as plaintiff, instituted that case in 1989 in the Eleventh Judicial Circuit of Florida. Donner's complaint named as defendants Appalachian Insurance Company ("Appalachian"), City of Miami, Florida ("the City"), City of Miami Police Officer Vernon Hetherington ("Hetherington"), Fowler, White, Burnett, Hurley, Banick & Knight, P. A. ("Fowler"), and attorneys Phillip W. Knight ("Knight") and Michael J. Murphy ("Murphy").

A. SUMMARY OF COMPLAINT

The allegations of Donner's complaint may be summarized as follows.

In previously-filed Circuit Case No. 76-8301, Donner had sued Hetherington, the City, and their insurer, Appalachian. In that earlier 1976 suit, Metropolitan Dade County, Florida ("Dade County") and certain county correctional officers (not parties to the case at bar) were also joined as defendants. In that earlier suit for damages, Donner claimed that, while exercising her "First Amendment" right to picket and gather signatures on a petition, she was falsely arrested on a charge of breach of peace by Hetherington, acting within the course and scope of his employment as a City of Miami Police Officer "under color of state law," and was thereby deprived of her "civil rights"; as a

result of that arrest, she was imprisoned in the Dade County Women's Annex as a pretrial detainee for five days; the personnel of that Annex, acting within the course and scope of their employment as employees of Dade County and "under color of state law," assaulted her, stripped her naked, and left her in a cold solitary cell (all in full view of male prison personnel) without clothing, blankets, towels, linen, medical attention, exercise facilities, running water, operable toilet, or elements of personal hygiene for four days; the breach of peace charge was ultimately dismissed.

Insurer Appalachian retained the Fowler law firm to represent defendants in Case No. 76-8301 and supervised their rendition of legal services. Attorneys Knight and Murphy, in the employ of that firm,

appeared in that case as defense counsel.

The City and Hetherington denied that the arrest was without "probable cause."

In Case No. 76-8301, "under color of state law," the City, Hetherington, Appalachian, the Fowler law firm, and Knight, in conspiracy with one another, engaged in the following pattern of fraudulent misrepresentation and concealment.

The City's April 12, 1976 answers to interrogatories, served by mail upon Donner by defense counsel Knight, falsely represented that witnesses to the arrest were "unknown."[2] In truth, names and ad-

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[2] Those same answers to interrogatories falsely stated that the City's insurer is "unknown" -- even though it was Appalachian that had retained the Fowler law firm. That same firm served Hetherington's answer to an insurance interrogatory, disclosing only Appalachian's policy. Then, in response to Donner's request for production of all policies, the City misrepresented the insurance coverage as limited just to the Appalachian policy, produc-

dresses of witnesses to the arrest incident were known to defendants since 1975 but those witnesses were no longer available to testify when finally years later Donner learned of them.

Hetherington's answers to interrogatories, served in 1977 by mail upon Donner by defense counsel Knight, falsely represented that the only statement given by Hetherington concerning the incident was a July 1, 1975 statement. Knight wrote a letter to the trial judge, falsely representing that the City had only that July 1, 1975 statement and a June 23, 1975 statement of Officer Parker. In 1978, Knight mailed Donner the City's responses to her requests for production, falsely representing that all records requested

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ed just the Appalachian policy, and concealed three other policies.

therein and ordered to be produced had been produced, and he mailed her a like false response to her motion for discovery sanctions. He even served upon her by mail Hetherington's false disclaimer of the authenticity of the two statements that the City had produced.

In addition to the officers' aforementioned statements that were produced, other requested-to-be-produced statements were known to, and in the custody of, the City, its counsel, and Appalachian but were not produced and in fact were concealed. Donner's complaint describes those concealed statements and explains their evidentiary significance favorable to her case and their relevance to the issues of both liability and damages.

At the 1980 trial in that case, the court directed a verdict in favor of the

City, Hetherington and Appalachian and entered judgment on that directed verdict. One year later, that verdict and judgment were reversed on appeal. Donner v. Hetherington, 399 So.2d 1011 (Fla. Dist. Ct. App. 1981). That action remains (now sixteen years later) still pending in the trial court. If not for that misrepresentation and concealment, Donner would have had access to those withheld records and could have presented additional evidence at the 1980 trial that would have contradicted and impeached Hetherington's testimony and would have avoided entry of that directed verdict and the expense and mental anguish attendant upon the aforementioned appeal. At that 1980 trial, after that verdict was directed, the jury returned a $15,000 verdict on Donner's claims against Dade County and its correc-

tional officers. The amount of that verdict was impaired as a result of the unavailability to Donner of those concealed records.

All those representations were known by defendants to be false when made or were made without knowledge of whether they were true, were made with the intention that Donner rely upon their truth, and were material to the preparation and presentation of her case for trial, not only against Hetherington, the City, and Appalachian, but also against Dade County and its correctional officers, and Donner did so rely to her detriment.

On October 28, 1981, Donner made a "public records demand" upon the City Attorney, upon the Fowler law firm, and upon Murphy to produce their respective case files relating to the claims asserted

in Case No. 76-8301. Included in those files were the concealed statements, records referring thereto, and records confirming defendants' knowledge of the concealed items of information.

In response to that request, in order to conceal that scheme, and in order to deprive Donner of her claims asserted in Case No. 76-8301, the City, Fowler and Murphy, in conspiracy with one another and with the other defendants and "under color of state law," responded that the demanded public records would be produced only "when donkeys fly." Donner was forced to initiate Case No. 81-369 EX, a mandamus proceeding against Murphy, Fowler, and the City, to gain access to those records. That proceeding resulted in the issuance of a writ of mandamus requiring those records custodians to produce the demanded

public records and on August 19, 1985 public records were for the first time produced to Donner for inspection.

During the four-year duration of that mandamus proceeding, Case No. 76-8301 was stayed and further delayed. Also as a result of that conspiracy, Donner suffered mental anguish, evidence useful in prosecuting her claims (including claims for violation of her "civil rights") has been lost, and memories of witnesses useful in prosecuting her claims (including claims for violations of her "civil rights") prejudicially faded.

B. DISMISSAL OF THE COMPLAINT WITH PREJUDICE

In Case No. 89-37625, two motions to dismiss the complaint were filed, one in behalf of Hetherington and the City and the other in behalf of Appalachian, Fowler, Knight and Murphy. Appalachian's

motion asserted as a ground "absolute privilege" for "statements or pleadings made in the course of judicial proceedings" but cited no supporting authority. The motion filed in behalf of the City and Hetherington asserted no such "privilege." The trial court granted both motions to dismiss and dismissed the complaint with prejudice, but without specifying the ground for dismissal. (appendix 5-7) Donner's timely-filed motion for rehearing and timely addendum thereto pointed out that the complaint sets out causes of action under Florida state law, under "18 U.S.C. Sec. 1964(c)," and under "42 U.S.C. Sec. 1983." Her motion alternatively requested at least one opportunity to amend the complaint. That motion for rehearing and addendum thereto were denied.(appendix 8-9)

C. APPEAL AND AFFIRMANCE

Donner appealed that dismissal to the District Court of Appeal of Florida, Third District. Donner briefed as issues presented for review her contentions that "all elements of a federal civil rights action are alleged" (Donner's Initial and Reply Briefs), that "all elements of a federal civil RICO action are alleged" (Donner's Initial and Reply Briefs), and that no privilege for statements made in the course of judicial proceedings applies under Sec. 1983 or RICO to defendants' alleged misconduct (Donner's Initial and Reply Briefs).[3] In regard to the above-quoted issues, Donner argued that privilege under Sec. 1983 "is an issue of fed-

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[3] Donner also presented as an issue on appeal, and briefed argument in regard to, the trial court's erroneous denial of her request for leave to amend the complaint.

eral, not Florida, law," and that, under federal law, neither defendants' concealment of witnesses' names (requested in interrogatories) and of records (requested to be produced in pretrial discovery and in public records demands) nor their fraudulent misrepresentations in furtherance thereof, nor their conspiracy in that regard were immunized from Sec. 1983 or RICO liability by any "litigation" or judicial-proceeding "privilege." (Donner's Initial and Reply Briefs) Those appellate arguments were supported by citations to federal precedent. Additionally, Donner's Initial and Reply Briefs argued, and cited, in the context of federal RICO, federal cases affirming mail fraud convictions for false statements and false answers to interrogatories in judicial proceedings.

The Third District affirmed with an opinion. (appendix 1-4) In regard to Case No. 76-8301, the Third District stated:

> "Following a series of false starts, frustrated discovery forays, and appeals, the 1976 action languishes below awaiting retrial."

(appendix 1-2) The opinion next adverts to Donner's public records mandamus proceeding, "seeking access to the litigation files from" Case No. 76-8301, to her successful prosecution of that proceeding, and to her allegation that only when those files were produced under the writ of mandamus did she uncover defendants' "alleged fraudulent misrepresentations made during discovery" in Case No. 76-8301. According to that opinion, Donner then filed Case No. 89-37625 and

> "... [pled] multiple causes of action arising from alleged fraudulent misrepresentations ... The trial court dismissed that complaint with prejudice for failure to state a claim."

(appendix 2-3) No reference is made in that opinion to the federal nature of claims pled in Donner's complaint. Nor are any federal cases cited. The Third District merely states:

> We agree with the trial court that the complaint Ms. Donner filed in this action failed to state a cognizable claim. *See Ponzoli & Wassenberg, P. A. v. Zuckerman*, 545 So.2d 309 (Fla. 3d DCA 1989), *rev. denied*, 554 So. 2d 1170 (Fla. 1989) (statements made in the course of judicial proceedings enjoy absolute privilege); *Wright v. Yurko*, 446 So. 2d 1162 (Fla. 5th DCA 1984); *Perl v. Omni Int'l of Miami, Ltd.*, 439 So. 2d 316 (Fla. 3d DCA 1983) (same).

(appendix 3) Footnote 3 to the opinion below relegates Donner rather to the trial court to apply in the pending 1976 action for "sanctions" in regard to the alleged discovery violations.[4]

Donner timely moved for rehearing,

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[4] Footnote 3 also notes that the opinion should not be read as barring amendment of the complaint in Case No. 76-8301.

pointing out that the Third District's reliance upon Florida state court case precedents concerning state law on the issue of immunity overlooked the fact that her complaint stated federal Sec. 1983 and RICO causes of action and that, under Howlett by and through Howlett v. Rose, 110 S.Ct. 2430 (1990), Martinez v. State of California, 444 U.S. 277 (1980), Briscoe v. LaHue, 460 U.S. 325 (1983), and other cited federal cases, federal, not state, law is controlling. That motion alternatively requested clarification of the opinion to refer to the federal nature of those causes of action to aid this Court in adjudicating a petition for writ of certiorari. That motion was denied. Donner's petition to the Florida Supreme Court for review of the appellate affirmance was also denied. (appendix 10 and 11)

SUMMARY OF ARGUMENT

The Third District's erroneous reliance upon Florida state law as immunizing defendants against liability under Sec. 1983 and RICO is reviewable by this Court even though the Third District omitted any mention of the federal nature of those causes of action. The test to be applied under Street v. New York, 394 U.S. 576, 581-584 (1969) is whether the federal nature of those causes of action was at the trial level preserved for review and was at the appellate level presented for review. That test is fully satisfied by the record below.

The Third District's reliance upon state law as immunizing defendants from liability in regard to those federal claims directly conflicts with this Court's recent decision in Howlett, 110

S.Ct. 2430, requiring the application of federal law.

In regard to the Sec. 1983 claim, this Court has recognized only limited immunity in the context of "defamation" for "statements made in the course of judicial proceedings." That immunity is here inapplicable for the following reasons: Donner's Sec. 1983 claim is not for "defamation"; defendants' concealment of records and information cannot be characterized as "statements"; neither Donner's extrajudicial demand for access to public records nor defendants' extrajudicial denial thereof was "in a judicial proceeding"; pretrial discovery was not known to the common law when Sec. 1983 was enacted; and the underlying conspiracy was not alleged to have been formulated in a judicial proceeding.

That in-any-event-inapposite immunity is not applicable to Donner's RICO claim for the additional reason that this Court noted in Briscoe v. LaHue, 460 U.S. 325, 339 n.22 (1983) -- that statements made in the course of judicial proceedings are not immune from criminal liability. Under 18 U.S.C. Sec. 1964(c), conduct that gives rise to criminal liability also gives rise to civil liability.

This Court should exercise its discretion by accepting certiorari jurisdiction. The Third District's decision conflicts with decisions of this Court and of the Courts of Appeal and deprives Donner of any federal remedy for the damage caused by defendants' misconduct under color of state law that has so long delayed and frustrated her prosecution of Case No. 76-8301, a sixteen-year-old action.

ARGUMENT

I. THIS COURT IS VESTED WITH CERTIORARI JURISDICTION TO REVIEW THE FLORIDA STATE COURT JUDGMENT

This Court is vested with jurisdiction to review the Florida state court judgment because that judgment disposes of an important issue of immunity, regarding Donner's federally-based causes of action, in a way that conflicts with applicable decisions of this Court and of United States courts of appeal.

That conflict is no less real simply because the Third District's opinion chose not to mention the federal nature of the issues disposed of by its judgment. The Third District grounds its decision, that the complaint "failed to state a cognizable claim," solely upon Ponzoli & Wassenberg, P. A. v. Zuckerman, 545 So. 2d 309, Wright v. Yurko, 446 So.2d 1162, and Perl

v. Omni Int'l of Miami, Ltd., 439 So. 2d 316, all cited as applying a privilege immunizing statements made in the course of judicial proceedings. Those cases concerned only non-federal claims. The Third District omits mention of federal law simply by omitting reference to the federal nature of Donner's pleaded claims.

A. PRESERVATION OF ISSUES FOR REVIEW

That omission does not foreclose this Court's exercise of certiorari jurisdiction. In Street v. New York, 394 U.S. 576, 581-584 (1969), even though no mention of the federal issue appeared in the state court judgment, jurisdiction was held to exist where the record below demonstrated that the federal issue had been preserved at the state court trial level for appellate review and had been raised on appeal to the New York state appellate court. The

record at bar meets those criteria.

1. PRESERVATION OF ISSUES AT TRIAL LEVEL

First of all, at the trial level, the federal nature of Donner's Sec. 1983 and RICO claims, not only was explicitly articulated in her timely motion for rehearing and addendum thereto,[5] but also appeared on the face of the complaint. In pleading a statutory cause of action in a Florida state court, it is not necessary to include any reference to the statute, so long as the complaint's factual allegations plead all the elements of the cause of action. City of Lakeland v. Select Tenures, Inc., 129 Fla. 338, 176 So. 274, 277 (1937); Vance v. Indian Hammock Hunt & Riding Club, 403 So.2d 1367, 1369 (1981).

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[5] Fla. R. Civ. P. 1.530(a) and (b) authorizes service of a motion for rehearing of a judgment within ten days after entry thereof.

City of Lakeland, 176 So. at 277 explained that Florida courts are required to take "public cognizance of all public statutes." That rule has now been codified in Sec. 90.201(1), Fla. Stat., mandating that the trial court judicially notice federal (and state) law. The commentary accompanying that statute further states that Florida law is in accord with the statement in McCormick, Evidence Sec. 335 (2nd ed 1972) that "state courts will notice the federal law that is controlling." Furthermore, in Pizzi v. Central Bank & Trust Co., 250 So.2d 895 (Fla. 1971), the Florida Supreme Court held that the trial court is confined "strictly to the allegations within the four corners of the complaint" in adjudicating a motion to dismiss. Florida additionally subscribes to the familiar rule that "[i]f a complaint states a cause

of action upon any ground, a motion to dismiss the complaint for failure to state a cause of action should be denied." Lytell v. McGahey Chrysler-Plymouth, Inc., 180 So.2d 354, 355 (Fla. Dist. Ct. App. 1965). It will be seen that the factual allegations within the four corners of Donner's complaint do plead elements of federal Sec. 1983 and RICO claims.[6]

(a) 42 U.S.C. SEC. 1983 ACTION

First to be considered is Donner's Sec. 1983 claim. Gomez v. Toledo, 446 U.S. 635, 640 (1980) holds that such a claim is alleged simply by stating that defendant deprived plaintiff of a federal right un-

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[6] It will also be seen (in section C of this Argument, post) that, within the four corners of the complaint, appear allegations of misconduct that do not constitute "statements made in the course of judicial proceedings" immune from Sec. 1983 and RICO liability.

der color of state law. Since the defendant City is a local governmental unit, since its insurer and defense counsel allegedly acted in behalf of, and in "conspiracy" with, the City, and since Hetherington allegedly also "conspired" with them, all were properly alleged to have acted "under color of state law."[7] Adickes v. S.H. Kress & Co., 398 U.S. 144, 150-152 (1970); Ryland v. Shapiro, 708 F.2d 967,

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[7] Cities are included among the "persons" subject to liability under Sec. 1983. Monell v. Department of Social Services of City of New York, 436 U.S. 658, 690 (1978). While Monell limits the City's own liability just to acts of official municipal policy, the alleged misconduct of the City acting through its attorneys in Case No. 76-8301 meets that criterion; Fla. R. Jud. Admin. 2.060(1) provides:

> "In all matters concerning ... defense of any proceeding in the court, the attorney of record shall be the agent of the client and any ... act by the attorney in the proceeding shall be accepted as the act of ... the client."

974 (5th Cir. 1983); Harrison v. Springdale Water & Sewer Commission, 780 F.2d 1422, 1426 n.4, 1430, n.14 (8th Cir. 1986). Donner's complaint also sufficiently alleged that defendants' misconduct deprived her of rights secured by the Constitution and under federal law -- her right of meaningful access to court to prosecute Case No. 76-8301. In Ryland v. Shapiro, 708 F.2d 967 (5th Cir. 1983), the Fifth Circuit held that Ryland's similar complaint, alleging that defendants' misconduct under color of state law delayed for eleven months Ryland's right of access to state court in regard to Ryland's state court wrongful death action, pled a cognizable Sec. 1983 claim for at least nominal damages for First and Fourteenth Amendment violations. Ryland, 708 F.2d at 971-973 cites California Motor Transport

Co. v. Trucking Unlimited, 404 U.S. 508 (1972) (right of access to courts is aspect of First Amendment right to petition); Wolff v. McDonnell, 418 U.S. 539, 579 (1974) (Due Process Clause protects right of access to courts to present claims concerning violations of fundamental constitutional rights); Logan v. Zimmerman, 455 U.S. 422, 428 (1982) (cause of action is species of property[8] protected by Due Process Clause).

Ryland, 708 F.2d at 975 aptly reasoned:

The defendants' actions could have

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[8] In Ryland, 708 F.2d at 973, it is noted that Ryland's wrongful death action had the "property" attribute of inheritability under Louisiana law. In regard to a Sec. 1983 claim, Smith v. City of Fontana, 818 F.2d 1411, 1416-1417 (9th Cir. 1987), cert. denied, 108 S.Ct. 311 (1987), holds that inheritability is determined by state law and, in that regard, Sec. 46.021, Fla. Stat. treats Donner's claims as inheritable.

> prejudiced the Rylands' chances of recovery in state court because the resulting delay would cause stale evidence and the fading of material facts in the minds of potential witnesses. Moreover, it could well prove more expensive to litigate such action. Finally, any interference with a substantive constitutional right, such as the right of access to the courts, may by itself amount to a constitutional deprivation (unless reasonably justified by countervailing state interest).

The allegations of Donner's complaint in Case No. 89-37625 are even more compelling than were those in Ryland because allegedly defendants' under-color-of-state-law misconduct delayed for many years and damaged Donner's underlying causes of action in Case No. 76-8301 that included, not only state-law based claims for false arrest and false imprisonment, but also federally-based claims for First and Fourteenth Amendment violations under

Sec. 1983.[9]

(b) RICO CAUSE OF ACTION

Donner's complaint also stated elements of a RICO claim. Allegedly defendants[10] conspired to send through the mail

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[9] Compare also Zinermon v. Burch, 110 S.Ct. 975 (1990) (availability of state court remedy to correct Bill of Rights violation does not foreclose Sec. 1983 action); Flores v. Perez, 617 F.2d 1386, 1388, 1392 (9th Cir. 1980), cert. denied, 449 U.S. 875 (1980) (Sec. 1983 damages for mental anguish recoverable for discriminatory state action resulting in delay); Memphis Community School District v. Stachura, 477 U.S. 299, 308 n. 11 (1986) (at least nominal Sec. 1983 damages recoverable for constitutional deprivation); Davis v. Village Park II Realty Co., 578 F.2d 461, 463-464 (2d Cir. 1978) (Sec. 1983 damages recoverable for emotional distress and, absent proof of actual injury, nominal damages recoverable for constitutional deprivation); Dykes v. Hosemann, 743 F.2d 1488, 1500 (11th Cir. 1984) (en banc) (nominal and punitive Sec. 1983 damages recoverable).

[10] It has been held that treble RICO damages constitute a "penalty" for which a City may not be held liable. Gentry v. Township of Gloucester, 736 F.Supp. 1322 (D.N.J. 1990)However, the remaining defendants are not thereby exempted.

an extended series of fraudulent pretrial discovery responses, comprising a "pattern"[11] of mail fraud violative of 18 U.S.C. Sec. 1341[12],[13], extending over a continuum of several years, depriving Donner of her property interest in the claims

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[11] H.J., Inc. v. Northwestern Bell Telephone Co., 109 S.Ct. 2893, 2901 (1989); see also Morley v. Cohen, 888 F.2d 1006 (4th Cir. 1989) (fraudulent 1976 and 1977 misrepresentation concealed until 1981).

[12] U.S. v. Peters, 732 F.2d 1004, 1006-1007 (1st Cir. 1984) (affirming mail-fraud conviction under count charging false answers to pretrial discovery interrogatories); U.S. v. Leyden, 842 F.2d 1026, 1029 (8th Cir. 1988), citing Peters as illustrative of the applicability of "mail fraud" to "legal proceedings"; U.S. v. Vaughan, 797 F.2d 1485, 1492-1493 (9th Cir. 1986) (affirming attorney's mail fraud conviction for petition and follow-up letters he knew to be false in administrative proceeding); Tafflin v. Levitt, 110 S.Ct. 792, 798-799 (1990) (many RICO cases involve state fraud claims).

[13] 18 U.S.C. Sec. 1961(1) defines a violation of sec. 1341 as a "racketeering activity."

she asserted in Case No. 76-8301.[14]

(c) LEAVE TO AMEND

Even if, arguendo, some element of Donner's RICO action were pled imperfectly, that circumstance could not explain either the initial complaint's dismissal with prejudice or the Third District's affirmance of that dismissal with prejudice. Such a dismissal would be precluded, first, by her well-pled Sec. 1983 claim and, second, by Florida cases uniformly holding that a plaintiff is entitled to at least one opportunity to amend unless the allegations of the complaint confirm that amendment would be futile. Posey v. Magill, 530 So.2d 985 (Fla. Dist. Ct. App. 1988); Highlands County School Board v. K.D. Hedin Construction, Inc., 382 So.2d

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[14] Logan v. Zimmerman, 455 U.S. 422, 428 (1982) (cause of action is species of property protected by Due Process Clause).

90 (Fla. Dist. Ct. App. 1980); Tucker v. Bray, 458 So. 2d 841, at 842 (Fla. Dist. Ct. App. 1984). Wells Fargo Armored Services Corp. v. Sunshine Security & Detective Agency, Inc., 575 So. 2d 179 (Fla. 1991) recently held:

> "... Florida recognizes a rule favoring a right of amendment after a party has failed to state a cause of action ... denial of a right to amend simply because prior attempts to state a cause of action have failed may be deemed an abuse of discretion."

Nothing in the complaint at bar suggests that any such amendment would be "futile." Donner's appellate briefs clearly adverted the attention of the Third District to these points of law.

The foregoing analysis of the allegations within the four corners of the complaint demonstrates that, in accordance with Street, 394 U.S. 576, the trial

court's erroneous dismissal with prejudice[15] of Donner's federal causes of action was preserved for the Third District's review.

2. PRESERVATION OF ISSUES ON APPEAL

On appeal to the Third District, those issues were equally well preserved for review in Donner's initial and reply briefs and in her motion for rehearing.

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[15] The affirmance of the dismissal "with prejudice" is not altered by the Third District's footnoted comment that its opinion should not be read as barring a motion for leave to amend in Case No.76-8301. That footnote stops short of allowing an amendment that would add as causes of action those claims dismissed in the case at bar. If the Third District's intent were to allow such an amendment, it would, instead of affirming the dismissal with prejudice, have reversed with directions to enter a dismissal without prejudice to a motion for leave to amend in Case No. 76-8301 to add such causes of action. Such an amendment in Case No. 76-8301, especially one adding as parties the attorneys, would now in any event be confronted by a statute of limitations defense.

Section C of the prefatory Statement of the Case, ante, summarizes those issues and arguments, fully presented in her initial and reply briefs and in her appellate motion for rehearing. In fact, as an alternative to rehearing, Donner requested that the Third District clarify its opinion by making specific reference to the federal nature of the issues; that request was likewise denied. According to the Florida Supreme Court's pronouncements in Pizzi, 250 So.2d at 896-897, the only lower court record that was needed for review of the propriety of the order of dismissal was the complaint itself, included in the record below. Thus, the Third District's omission of any mention of the federal nature of the causes of action and its reliance only upon Florida case law is not an impediment to this

Court's exercise of its certiorari jurisdiction pursuant to Street, 394 U.S. 576 to review that Third District decision.

B. STATE COURTS MUST APPLY FEDERAL LAW TO ISSUES OF IMMUNITY IN REGARD TO FEDERAL ACTIONS

A similar error was committed by the Third District's sister court in Howlett v. Rose, 537 So. 2d 706 (Fla. Dist. Ct. App. 1989), rev. denied, 545 So. 2d 1367 (Fla. 1989), rev'd sub nom. Howlett by and through Howlett v. Rose, 110 S.Ct. 2430 (1990). In that Sec. 1983 case, the Florida court likewise eschewed federal law and instead invoked a Florida doctrine of municipal immunity. In reversing that decision, this Court held in Howlett, 110 S.Ct. at 2443-2444:

> "The elements of, and the defenses to, a federal cause of action are defined by federal law."
>
> "'Congress surely did not intend to assign to state courts and legisla-

> tures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action."'

Howlett, 110 S.Ct. at 2443, cites Martinez v. State of California, 444 U.S. 277, 284 (1980), holding:

> "'Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. Sec. 1983 ... cannot be immunized by state law...'"

C. FEDERAL LAW DOES NOT IMMUNIZE DEFENDANTS' ALLEGED MISCONDUCT

Defendants' alleged misconduct is not accorded any immunity under federal law.

1. NO SUCH IMMUNITY ARISES UNDER 42 U.S.C. SEC. 1983

On the issue of immunity under Sec. 1983, Briscoe v. LaHue, 460 U.S. 325 (1983) held that American common law, as found to exist in 1871, is controlling. That case narrowly limited its holding just to the absolute immunity applicable to a witness' allegedly perjured trial

testimony (not to non-testimonial misconduct such as is at issue in the case at bar). Briscoe, 460 U.S. at 332 n.12, quotes with approval the declaration in Johnson v. Brown, 13 W.Va. 71, 128-129 (1878) that the overwhelming weight of authority precluded "an action of slander or libel ... for libelous matter, spoken or written in the course of regular judicial proceedings."[16] In that regard, Tower v. Glover, 467 U.S. 914, 922 (1984) recognizes that, "at common law, defense counsel would have benefited from immunity for

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[16] The Third District's affirmance of the dismissal with prejudice of Donner's claim, erroneously grounded on immunity, stopped short of otherwise considering the legal sufficiency of her claims. Briscoe, 460 U.S. at 328 n.3, accepted jurisdiction to review a lower appellate court decision, grounded solely on immunity, even though that lower court had not passed upon whether the Sec. 1983 claim was otherwise well pled.

defamatory statements in the course of judicial proceedings," citing Justice White's concurrence in Imbler v. Pachtman, 424 U.S. 409, 439 (1976) (both prosecutors and private attorneys' "false and defamatory statements" "made during and relevant to a judicial proceeding" are immune). In that same regard, Burns v. Reed, 111 S.Ct. 1934, 1941 (1991) recognizes that, at common law, witnesses, prosecutors, and lawyers were immune from liability for "false or defamatory statements in judicial proceedings." Justice Scalia's partial concurrence in Burns, 111 S.Ct. at 1946-1947 lists just three categories of immunity, "Judicial immunity," "Quasi-judicial immunity," and "Defamation immunity." Since defendants in the case at bar exercised no judicial or quasi-judicial functions, that would leave only the third category to be

considered. Consistent with the foregoing precedents is Justice Scalia's additional assertion that the third category of immunity extends "only against suits for defamation." Id.

(a) DONNER'S SEC. 1983 CLAIMS ARE NOT FOR DEFAMATION; NOR DOES CONCEALMENT OF INFORMATION EVEN CONSTITUTE A "STATEMENT"

Donner's suit is not for "defamation" for the following reasons. First of all, the City's failure to produce, and concealment of, records requested in pretrial discovery and in the public records demand did not even constitute "statements," much less defamation. Secondly, defendants' false pretrial discovery responses that witnesses are unknown and that all requested records had been produced were not defamatory; rather they prejudicially deprived plaintiff of access to witnesses and delayed access to records useful to

her prosecution of Case No. 76-8301. Thirdly, neither defendants' response that they would produce the demanded public records "when donkeys fly" nor their years of refusal to comply with Donner's access to those public records could be categorized as "defamation"; rather the complaint alleges that their conspiracy to conceal information was thereby furthered and the prejudicial litigation delay exacerbated.

(b) DEFENDANTS' REFUSAL OF DONNER'S PUBLIC RECORDS DEMAND IN FURTHERANCE OF THEIR CONSPIRACY TO CONCEAL RECORDS WAS NOT "IN A JUDICIAL PROCEEDING"

Absolute immunity for that conspiracy, as it relates to defendants' wrongful refusal of Donner's public records demand, is precluded for yet another reason: neither the demand nor the refusal was "in the course of judicial proceedings." Burns, 111 S.Ct. at 1941; Tower, 467 U.S.

at 922; Briscoe, 460 U.S. at 332 n.12. Imbler, 424 U.S. at 426 n.23, limits "defamation" immunity to relevant "courtroom statements" and to lawyers' "briefs and pleadings." While the demanded public records related to Case No. 76-8301, the complaint alleges that Donner's demand and defendants' refusal took place, not in that case, not in any judicial proceeding, courtroom, pleading or brief, but rather under Sec. 119.01 et seq., Fla. Stat. (1975) (allowing public access to public records upon demand). Only after the City and its records custodians extrajudicially failed to comply with that demand was the mandamus proceeding instituted.[17],[18]

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[17] See also opinion below's discussion of the course of events in the mandamus proceeding and its citation to the appellate decisions in that proceeding: Donner v. Edelstein, 415 So.2d 830 (Fla. Dist. Ct. App. 1982) and Edelstein v. Donner, 450 So.2d 562 (Fla. Dist. Ct. App. 1984),

(c) INTERROGATORIES AND REQUESTS FOR PRODUCTION WERE UNKNOWN TO THE COMMON LAW

Pretrial discovery interrogatories, answers to interrogatories, requests for production, and responses to requests for production were unknown to the common law in 1871; nor did they have any analogous counterpart at common law. Although one might argue that defamatory statements included in any such answers and responses ~~might~~ are "in a judicial proceeding" and therefore immunized, no similar argument may be advanced and no 1871 common-law precedent may be found with regard to statements, included in such answers or responses, that are not defamatory, but are fraudulent (such as are at issue in

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approved, 471 So.2d 26 (Fla. 1985).

[18] Compare Burns, at 1944 ~~451~~ (out-of-court legal advice held not absolutely immune)

the case at bar). Analogously, in Burns, 111 S.Ct. at 1943, this Court rejected the amicus curiae's attempt to alibi the absence of 1871 precedents for immunity; the rejected alibi was that the office sought to be immunized first developed after that date. Quoting Tower, 467 U.S. at 922-923, this Court in Burns at 1943 answered that argument as follows:

> "We do not have a license to establish immunities from Sec. 1983 actions in the interests of what we judge to be sound public policy."

Pretrial discovery sanctions were of course also unknown to the common law. Application of the doctrine of immunity to pretrial discovery cannot be rationalized by pointing to modern pretrial discovery sanctions as an alleged equivalent substitute. Discovery sanctions do not fill that role. For example, in the case at bar, allegedly defendants' discovery misconduct

prejudicially diminished the amount of the verdict that Donner secured against Dade County and its correctional officers. No manner of discovery sanction could be fashioned to recoup those damages. No damages, other than attorneys fees and costs, are awarded as a discovery sanction. Moreover, discovery sanctions are imposed against only the party to whom the discovery is directed; no discovery mechanism exists for sanctions against other persons (such as attorneys and insurer) conspiring with them to make fraudulent discovery responses. Even if those persons were to be held in contempt of court, that would not obviate the damage that Donner suffered. Immunity for fraudulent pretrial discovery responses has been rejected in Beeck v. Kapalis, 302 N.W.2d 90 (Iowa 1981) and Morgan v. Graham, 228 F.2d 625 (10th Cir.

1956) (applying state law). Furthermore, in the light of a Sec. 1983 claimant's entitlement to proceed with his claim without first exhausting state tort remedies or other state postdeprivation remedies, cf. Zinermon v. Burch, 110 S.Ct. 975 (1990), the mere fact that there now exist possible state court discovery sanctions should not foreclose the federal remedy.

(d) COMPLAINT DOES NOT ALLEGED THAT CONSPIRACY WAS ENTERED INTO "IN A JUDICIAL PROCEEDING"

Even without regard to any of the foregoing considerations, the facts remain that the complaint alleges defendants' misconduct was pursuant to a "conspiracy" and that nowhere in the complaint is it alleged that the conspiracy was itself hatched "in a judicial proceeding."

For example, the conspiracy necessarily predated the mailing of the City's

fraudulent interrogatory answers that were the product of the conspiracy. Even if the act of serving those answers by mail were, arguendo, assumed at that time to introduce them into the "judicial proceeding" and to render them "defamatory," nonetheless, the antecedent conspiracy would satisfy neither of those two requirements.

Analogously, in Tower, 467 U.S. at 922, this Court held public defenders not to be immune from Sec. 1983 liability for their alleged conspiracy to cause a criminal defendant's conviction, even though any such alleged conspiracy must have been hatched after those public defenders were appointed (and therefore during the time when that judicial proceeding was pending) and even though that conspiracy was allegedly implemented in the criminal proceeding.

Burns, 111 S.Ct. at 1939, aptly states that the person

> "... seeking absolute immunity bears the burden of showing that such immunity is justified ... We have been 'quite sparing' in our recognition of absolute immunity, Forrester, supra, at 224, and have refused to extend it any 'further than its justification would warrant.' Harlow, supra, at 811."

Applying the above-quoted rule to this case, in the light of the fact that the complaint does not allege that the conspiracy was hatched in a judicial proceeding and in the light of the rule in Pizzi, 250 So.2d 895 that, on a motion to dismiss for failure to state a cause of action, only the allegations within the four corners of the complaint may be considered, defendants could not possibly have satisfied their "burden" to show that their conspiracy was absolutely immune. It is evident that the Third District has ex-

tended the scope of immunity, not "sparingly," but rather with the broadest possible brush, outside the parameters prescribed by this Court's prior decisions.

2. NO SUCH IMMUNITY ARISES UNDER FEDERAL CIVIL RICO

The immunity issue is also readily disposed of in the context of RICO. The RICO claim arises under 18 U.S.C. Sec. 1964(c), providing a civil remedy with regard to conduct subject to criminal penalties under the correlative Sec. 1963. In that sense, it differs from a Sec. 1983 claim, restricted to the civil arena. Briscoe, 460 U.S. at 339 n.22 recognizes that there is no immunity from criminal prosecution for statements made in the course of judicial proceedings. Thus, no such immunity can be invoked on the civil side in regard to the double-edged RICO statute. Since there is no immunity from

the parallel criminal RICO liability for statements made during judicial proceedings,[19] neither is there any such privilege under civil RICO. Hence, even if such a privilege were applicable under Sec. 1983, it would not apply under RICO.

II. DISCRETION SHOULD BE EXERCISED IN FAVOR OF ACCEPTING CERTIORARI JURISDICTION

Certiorari jurisdiction should be accepted not only because of the foregoing analysis demonstrating the conflicts between the Florida state court decision and the decisions of this Court and of the

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[19] U.S. v. Peters, 732 F.2d 1004, 1006-1007 (1st Cir. 1984) (affirming mail-fraud conviction under count charging false answers to pretrial discovery interrogatories); U.S. v. Leyden, 842 F.2d 1026, 1029 (8th Cir. 1988), citing Peters as illustrative of the applicability of "mail fraud" to "legal proceedings"; U.S. v. Vaughan, 797 F.2d 1485, 1492-1493 (9th Cir. 1986) (affirming attorney's mail fraud conviction for petition and follow-up letters he knew to be false in administrative proceeding).

Courts of Appeal and but also because the conflict concerns important immunity, civil rights, and RICO issues.

The Third District's decision deprives Donner of any federal remedy for this extreme interference with her access to the courts to vindicate her state-law based claims for false arrest, false imprisonment and cruel and inhumane conditions of incarceration and her federally-based Sec. 1983 claims for First and Fourteenth Amendment civil rights violations. Justice delayed is justice denied. In this case, justice has been delayed over sixteen years. Neither a municipal defendant nor its attorney nor its insurer nor any other person in conspiracy with them ought be privileged (via fraudulent pretrial discovery and public records misconduct) to delay a plaintiff's

access to the courts for so many years.

CONCLUSION

For all of the foregoing reasons, the jurisdiction of this Court should be invoked to review the decision below.

Respectfully submitted,

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MIRIAM DONNER

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

MIRIAM DONNER,

Petitioner,

vs.

APPALACHIAN INSURANCE COMPANY, a Rhode Island corporation, CITY OF MIAMI, VERNON HETHERINGTON, FOWLER, WHITE, BURNETT, HURLEY, BANICK & KNIGHT, P.A. a/k/a FOWLER, WHITE, BURNETT, HURLEY, BANICK & STRICKROOT, P. A., a Florida professional association, PHILLIP W. KNIGHT, and MICHAEL J. MURPHY,

Respondents

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

MIRIAM DONNER, Appellant,
v.
APPALACHIAN INSURANCE COMPANY, A Rhode Island corporation; City of Miami; Vernon Hetherington; Fowler, White, Burnett, Hurley, Banick & Knight, P.A. a/k/a Fowler, White, Hurley, Banick & Strickroot, P.A., a Florida professional association; Phillip W. Knight, and Michael J. Murphy, Appellees.

No. 90-1222
District Court of Appeal of Florida,
Third District.

May 7, 1991.
Rehearing Denied July 3, 1991.

Before SCHWARTZ, C.J., and JORGENSON and GODERICH, JJ.

JORGENSON, Judge.

Miriam Donner appeals from an order dismissing her complaint with prejudice. We affirm.

This appeal is the latest in a fifteen-year-old litigation morass. Ms. Donner's original action was filed in 1976 and sought damages for injuries arising from her arrest and the circumstances of her incarceration. Following a series of

false starts, frustrated discovery forays, and appeals,[1] the 1976 action languishes below awaiting retrial. In 1981, Ms. Donner sued the City of Miami and various attorneys, seeking access to the litigation files from the suit filed in 1976. Eventually, the court ordered those files produced.[2] In 1989, Ms. Donner sued the parties and attorneys involved in the previous lawsuits for multiple causes of action arising from alleged fraudulent misrepresentations made during the discovery in the 1976 action, which only came to

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[1] *See Donner v. Hetherington*, 399 So.2d 1011 (Fla. 3d DCA 1981); *Donner v. Hetherington*, 376 So.2d 404 (Fla. 3d DCA 1979); *Donner v. Hetherington*, 370 So.2d 1225 (Fla. 3d DCA 1979).

[2] *See Edelstein v. Donner*, 450 So.2d 562 (Fla. 3d DCA 1984), *approved*, 471 So.2d 26 (Fla.1985); *Donner v. Edelstein*, 425 So.2d 1220 (Fla. 3d DCA 1983); *Donner v. Edelstein*, 423 So.2d 367 (Fla. 3d DCA 1982); *Donner v. Edelstein*, 415 So.2d 830 (Fla. 3d DCA 1982).

light following production of the litigation files. The trial court dismissed that complaint with prejudice for failure to state a claim; Ms. Donner appeals.

We agree with the trial court that the complaint Ms. Donner filed in this action failed to state a cognizable claim. *See Ponzoli & Wassenberg, P.A. v. Zuckerman*, 545 So.2d 309 (Fla. 3d DCA), (statements made in the course of judicial proceeding enjoy absolute privilege); rev. denied, 554 So.2d 1170 (Fla. 1989); *Wright v. Yurko*, 446 So.2d 1162 (Fla. 5th DCA 1984); *Perl v. Omni Int'l of Miami, Ltd.*, 439 So.2d 316 (Fla. 3d DCA 1983) (same). We therefore affirm the dismissal.[3]

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[3] Our affirmance should not be read to bar Ms. Donner from seeking to amend her complaint pending in the circuit court or from asking the trial court to impose sanctions against the defendants for their alleged misconduct in the discovery proceedings.

We assign no fault to either party for the length of this litigation. However, "[i]t has been well said that there must be some point in every court proceeding when the cause is finally disposed of, its thread cut, and parties out of court .... The public welfare demands that there shall be some definite end to litigation--a point sometime, somewhere, when every case is terminated. We cannot afford to return to the interminable and outrageous practice similar to that depicted in Dickens' case of *Jarndyce v. Jarndyce*." *Mabson v. Christ*, 96 Fla. 756, 759, 119 So. 131, 132 (1928). We trust that trial of this cause will occur before the litigation assumes such Dickensian proportions.

Affirmed.

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA, GENERAL JURISDICTION DIVISION
CASE NO: 89-37625 CA17

MIRIAM DONNER,

Plaintiff,

vs.

APPALACHIAN INSURANCE COMPANY, a Rhode Island corporation, et al.,

Defendants.

FINAL ORDER OF DISMISSAL AND ORDER DENYING PLAINTIFF'S MOTION TO STAY

THIS CAUSE came to be heard on Tuesday, March 20, 1990, upon the Defendants, APPALACHIAN INSURANCE COMPANY; FOWLER, WHITE, BURNETT, HURLEY, BANICK & KNIGHT, P.A., a/k/a FOWLER, WHITE, BURNETT, HURLEY, BANICK & STRICKROOT, P.A., PHILLIP W. KNIGHT, MICHAEL J. MURPHY, VERNON HETHERINGTON, and the CITY OF MIAMI, Motion To Dismiss

Complaint, and Plaintiff's Motion To Stay Proceedings, and the Court having heard argument of Plaintiff and counsel, and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED:

1. Plaintiff's Motion to Stay is denied;

2. Defendants' Motion To Dismiss Complaint is granted, with prejudice.

3. Plaintiff shall go hence without day and recover nothing from the Defendants, APPALACHIAN INSURANCE COMPANY; FOWLER, WHITE, BURNETT, HURLEY, BANICK & KNIGHT, P.A., a/k/a FOWLER, WHITE, BURNETT, HURLEY, BANICK & STRICKROOT, P.A., PHILLIP W. KNIGHT, MICHAEL J. MURPHY, VERNON HETHERINGTON, and the CITY OF MIAMI.

DONE AND ORDERED in Chambers at

Miami, Dade County, Florida, this 22 day of March, 1990.

GEORGE ORR
CIRCUIT COURT JUDGE

Entered March 27, 1990

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR DADE COUNTY

GENERAL JURISDICTION DIVISION

CASE NO: 89-37625 CA 17

MIRIAM DONNER, :

Plaintiff, :

vs. :

APPALACHIAN INSURANCE COMPANY, a Rhode Island Corporation, et al., :

Defendant(s):

ORDER ON PLAINTIFF'S MOTION FOR REHEARING AND ADDENDUM TO MOTION FOR REHEARING

There having been served and filed by Plaintiff a Motion for Rehearing and Addendum to Motion for Rehearing and the same having come on for hearing before the Court on April 26, 1990 and the Court having heard argument of Plaintiff and De-

fense counsel, it is hereby ORDERED and ADJUDGED that the said motion is denied.

DONE and ORDERED in Chambers at Miami, in Dade County, Florida this 26th day of April, 1990.

GEORGE ORR
CIRCUIT JUDGE

SUPREME COURT OF FLORIDA
TUESDAY, OCTOBER 29, 1991

MIRIAM DONNER, Petitioner,	*	
v.	*	CASE NO. 78,309
	*	DISTRICT COURT OF APPEAL, 3RD DISTRICT
APPALACHIAN INSURANCE COMPANY, ETC., ET AL., Respondents.	*	NO. 90-1222

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330 (d).

OVERTON, Acting C.J., MCDONALD, GRIMES, KOGAN and HARDING, JJ., concur

IN THE DISTRICT COURT
OF APPEAL OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A.D.1991
JULY 3, 1991

MIRIAM DONNER,	**	CASE NO. 90-01222
Appellant(s),	**	
vs.	**	
APPALACHIAN INSURANCE COMPANY, et al.,	**	LOWER TRIBUNAL NO. 89-37625
Appellee(s).	**	

Upon consideration, appellant's motions for rehearing, certification or clarification and rehearing en banc is hereby denied. Appellees' motion for clarification of decision is denied.

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const., amend. I reads as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const., amend XIV, sec. 1 reads in pertinent part:

> ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; ...

42 U.S.C. section 1983 reads in pertinent

part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

18 U.S.C. section 1961 (1970) (amended 1984, 1986, 1988, and 1989) reads in pertinent part:

> As used in this chapter--
>
> (1) "racketeering activity"

means ... (B) any act which is indictable under ... section 1341 (relating to mail fraud) ...

* * *

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

18 U.S.C. section 1962 (1970) (amended

1988) reads in pertinent part:

> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. section 1964(c) reads in pertinent part:

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including 'a reasonable attorney's fee.

18 U.S.C. section 1341 (1970) (amended 1988) reads in pertinent part:

Whoever, having devised or intending to devise any scheme or artifice to defraud ... for the purpose of exe-

cuting such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service ... or knowingly causes to be delivered by mail according to the directions thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

(2)

Supreme Court, U.S.
FILED
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No.: 91-1227

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

MIRIAM DONNER,

Petitioner,

vs.

APPALACHIAN INSURANCE COMPANY, a Rhode Island Corporation, CITY OF MIAMI, VERNON HETHERINGTON, FOWLER, WHITE, BURNETT, HURLEY, BANICK & KNIGHT, P.A. a/k/a FOWLER WHITE, BURNETT, HURLEY, BANICK & STRICKROOT, P.A., a Florida professional association, PHILLIP W. KNIGHT, and MICHAEL J. MURPHY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

RESPONDENTS', CITY OF MIAMI'S AND VERNON HETHERINGTON'S, BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court is vested with Certiorari jurisdiction under *28 U.S.C. §1257(a)* to review a state court decision which is not final, does not draw into question the validity of either a treaty or statute of the United States or statute of any state, and further does not pass on any questions of federal law?

2. If so, whether this court should exercise its discretion, in favor of declining jurisdiction?

3. Assuming this Court exercises its discretion in favor of accepting Certiorari jurisdiction, whether the Petitioner has, in the four corners of the complaint, set forth a federal cause of action sounding under *42 U.S.C. §1983* and or under *18 U.S.C. §1964*?

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CONCISE JURISDICTIONAL STATEMENT

Petitioner seeks to invoke the certiorari jurisdiction of this Court under *28 U.S.C. §1257(a)*.

In 1988, *28 U.S.C. §1257* was amended and the jurisdiction of this Court thereunder limited. Congress did away with the appeal of right and left only certiorari, which is not a matter of right, but of judicial discretion. Certiorari shall only be granted where there are special and important reasons therefore. *Rules of the Supreme Court of the United States, Rule 10.*

The Petitioner has failed to invoke said certiorari jurisdiction, as the state court judgment: (1) does not challenge the validity of the Constitution, treaties, laws or statutes of the United States, (2) does not draw into question a state statute as repugnant to the Constitution; (3) is not final within the meaning of *28 U.S.C.*

§1257(a); (4) does not turn on federal law; as (5) no federal question was presented in an appropriate forum, time and manner; and thus, (6) turns solely on state law, specifically state procedural law, as to the appropriate forum, time and manner.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Respondents herein assert that there are no United States Constitutional provisions or federal statutes involved, as same have not been properly brought forth in the Complaint or throughout the judicial proceedings below, and are mere frivolous averment. Nonetheless, the constitutional provisions and statutes set forth by the Petitioner in the Petition for Writ of Certiorari are fully set forth therein, and pursuant to *Rules of the Supreme Court of the United States, Rule 24.1(f)*, need not be set forth herein.

The only federal statute involved as a

practical matter is *28 U.S.C. §1257(a)* which states:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

CONCISE STATEMENT OF THE CASE

To fully understand the posture of this case, one must return to the Metropolitan Justice Building (the criminal courthouse) in Miami, Dade County, Florida, in 1975. There, Petitioner, dressed in hot pants, a halter top, high heeled shoes and wearing a wig, was picketing and presenting petitions to pedestrians. She was claiming

that a then State of Florida Circuit Court Judge had denied her a fair trial in a civil lawsuit unrelated to the instant actions, and that there was a conspiracy against her.

As the crowd grew larger, VERNON HETHERINGTON, then a City of Miami police officer, requested that the Petitioner move from the area in front of the front doors and steps of the building to another area in front of the building. The Petitioner not only refused to move but instructed Hetherington to arrest her. After several requests, Officer Hetherington arrested the Petitioner and charged her with breach of the peace. Petitioner was then turned over to the Metropolitan Dade County Correctional Department, by whom she was incarcerated.

In 1976, Petitioner filed the first of several civil lawsuits. The complaint filed therein, against the City of Miami,

Vernon Hetherington, Appalachian Insurance Company[1], Metropolitan Dade County[2] and other Dade County Correctional Officers arose out of the 1975 arrest and incarceration.

In this 1976 civil litigation, Fowler, White, Burnett, Hurley, Banick and Knight, P.A., a/k/a Fowler, White, Burnett, Hurley, Banick & Strickroot, P.A., a Florida professional association, and attorneys Phillip W. Knight[3] and Michael J. Murphy (hereinafter collectively "THE ATTORNEYS") were attorneys of record representing the

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[1] Appalachian Insurance Company, a Rhode Island corporation, was a liability insurer for the City of Miami and police officer Vernon Hetherington.

[2] Metropolitan Dade County Department of Corrections and its officers while not parties to this Petition for Writ of Certiorari, nor to the state proceedings below, were a party to the initial 1976 litigation filed by Petitioner.

[3] Now Honorable Judge Phillip W. Knight of the Eleventh Judicial Circuit in and for Dade County, Florida.

City of Miami, police officer Vernon Hetherington, and Appalachian Insurance Company (hereafter collectively "INITIAL DEFENDANTS").

During the course of the 1976 lawsuit, the INITIAL DEFENDANTS through THE ATTORNEYS responded to various discovery, including interrogatories, sent a letter to the Petitioner, filed responses to three separate Requests for Production which had been propounded by the Petitioner, and filed a response to the Petitioner's Motion for Sanctions. All these actions were taken in and relevant to the 1976 litigation.

In April, 1980, the action came to be heard for jury trial[4,5]. The trial court

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[4] The case had previously been disposed of by way of Summary Judgment, however, it was appealed to the Third District Court of Appeal of the State of Florida, which reversed the Summary Judgment and remanded for trial. *Donner v. Hetherington*, 370 So.2d 1225 (Fla. 3rd DCA 1979).

directed a verdict in favor of the Initial Defendants and allowed the jury to reach a verdict against the remaining defendants, Metropolitan Dade County and the Dade County Correctional Officers. The jury returned a verdict in favor of the Petitioner, Miriam Donner, in the amount of $15,000 against those defendants.[6]

The Petitioner exercised her right to appeal the directed verdict, and the judgment entered thereon. Again, the Third District Court of Appeals of the State of

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[5] The action had also come to trial once before, however, it was terminated and dismissed by the judge due to the obstreperous conduct of the petitioner herein, Miriam Donner. That too was the subject of an appeal. *Donner v. Hetherington*, 376 So.2d 404 (Fla. 3d DCA 1979).

[6] The claim against the county defendants was for post-arrest conduct involving her confinement and treatment in jail. The City of Miami, police officer Vernon Hetherington, Appalachian Insurance Company and THE ATTORNEYS, are not, either in the 1976 litigation or in the instant litigation, charged or chargeable for that post-arrest conduct.

Florida reversed the directed verdict and remanded the cause for a new jury trial wherein the Petitioner could re-present all of her evidence, to a jury, on the issues of liability and damages against the INITIAL DEFENDANTS.[7]

It must be pointed out that despite the passage of nearly eleven (11) years from the final remand for trial, the re-trial of this 1976 litigation has not yet occurred. Petitioner would have this court believe that this is due to the Respondent's conduct. However, it is due, *inter alia*, to the Petitioner's multiple Motions for Recusal of many different Circuit Court Judges, and, Motions for Continuance.

Instead, in 1981 the Petitioner filed another lawsuit (hereinafter lawsuit No. 2), this time against: The City of Miami,

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[7] *Donner v. Hetherington*, 399 So.2d 1011 (Fla. 3d DCA 1981).

the Assistant City of Miami Attorney, Steve Edelstein; and, Michael J. Murphy (one of THE ATTORNEYS). She sought access to all of the personal litigation files of THE ATTORNEYS, which were created in connection with defending the Petitioner's claims in lawsuit No. 1. THE ATTORNEYS objected to the request and refused to produce the documents. The Petitioner asserted that since the documents were created by THE ATTORNEYS while acting on behalf of the City, they were susceptible to discovery under the *Freedom of Information Act* (government in the sunshine).

This 1981 action proceeded to the Florida Supreme Court, and, the documents were ordered to be produced. Eventually, on August 19, 1985, the requested records were produced pursuant Court Order. The Petitioner now has all of the records and

information which she has sought.[8]

Thereafter, on August 21, 1989, the Petitioner filed yet another action, the instant action, (hereinafter lawsuit No. 3) naming as defendants not only the parties to lawsuit No. 1, but also THE ATTORNEYS. The Petitioner in the Complaint in lawsuit No. 3, unartfully, unsuccessfully, and with the delicate precision of a jackhammer operator, attempts to state a cause of action for fraud, based upon the conduct of the INITIAL DEFENDANTS and THE ATTORNEYS in the judicial proceedings related to lawsuit No. 1 and lawsuit No. 2.

The City of Miami, and police officer Vernon Hetherington, filed their Motion to Dismiss, as did the other defendants,

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[8] *The Freedom of Information Act, F.S. §119* has subsequently been amended, and the work product and attorney-client privilege objection and defense asserted by THE ATTORNEYS in the aforementioned action was codified as an exception to the *Freedom of Information Act.*

setting forth, *inter alia*, that the Complaint failed to state a cause of action upon which relief can be granted. The motions, of the various parties, to dismiss Petitioner's complaint, were heard before the Court, having been duly noticed, and the Court granted all motions to dismiss the complaint with prejudice.

Petitioner moved for rehearing, which was denied. In her motion, she raised for the first time, albeit on a cryptic and colorless basis, the notion that her Complaint somehow involved, *inter alia, 42 U.S.C. §1983* civil rights violations and, *18 U.S.C. §1964 RICO*.

The Petitioner filed her appeal with the Third District Court of Appeal for the State of Florida. The issues asserted on appeal by the Petitioner were briefed by the parties and oral argument received by the court.

It must be pointed out that in the

instant case, before the trial court, the Petitioner herein was represented by counsel, and certainly, at the Third District Court of Appeal, she was represented by counsel not only for the purposes of authoring a brief, but also for the purposes of presenting oral argument.

The Third District Court of Appeal affirmed the Order dismissing the cause of action, setting forth that the litigation conduct complained of was afforded common law immunity, and, inviting the Petitioner to amend her complaint in the original 1976 litigation to seek redress for her grievances in connection with the discovery and other litigation conduct which took place in that 1976 proceeding.[9]

The Petitioner filed a Motion for Rehearing, Certification or Clarification

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[9] The opinion of the Third District Court of Appeals in this case is reproduced in the Petitioner's Petition for Writ of Certiorari as an Appendix on Page A-1.

and Rehearing En Banc, which was denied by the Third District Court of Appeal. (Petitioner's Petition for Writ of Certiorari at Page A-11).

Thereafter Petitioner sought the discretionary jurisdiction of the Florida Supreme Court by petitioning for Writ of Certiorari, which was, on October 29th, 1991, denied by the Florida Supreme Court. (Petitioner's Petition for Writ of Certiorari at A-10).

Thereafter, on January 24, 1992, the Petitioner filed the Petition for Writ of Certiorari in this Supreme Court of the United States. Pursuant to *United States Supreme Court Rules, Rules 15.2, 24.2, 29.2, and Rule 33*, this Brief in Opposition to the Petition for Writ of Certiorari is filed.[10]

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[10] Your undersigned counsel is not an admitted member of the United States Supreme Court Bar, however, has, on January 29, 1992, filed a Motion for Admission to

SUMMARY OF THE ARGUMENT

The discretionary jurisdiction of this Court pursuant to *28 U.S.C. §1257(a)* has not been properly invoked. The state court judgment does not challenge the validity of a State statute or challenge the validity of any provision of the Constitution or statutes of the United States of America.

The state judgment is not final within the meaning of *28 U.S.C. §1257(a)*. There has not been an effective termination of the litigation, as more remains to be done and decided. Review would be advisory and create piecemeal litigation.

The federal claims, if any, of the Petitioner herein, though not timely addressed or raised, are not foreclosed by the judgment and accordingly this matter is

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the Bar, Oath of Admission, and supporting application and affidavits, which Motion remains pending at the time of filing this Brief.

not ripe for adjudication by this Court.

The state court judgment decides only issues of state law. It did not, has not, and need not address any federal issues, as same were not properly presented.

The procedural path chosen by the Petitioner for the redress of her grievances was improper. The state court correctly dismissed the action and directed the Petitioner to the appropriate procedural course.

The Petitioner's complaint fails to set forth a cause of action for denial of access to courts. The complaint does not allege conduct by the Respondents which prevented the Petitioner from seeking redress, otherwise punished her for doing so, or had a chilling effect on her.

The Complaint fails to set forth that or any other federal cause of action sounding under *42 U.S.C. §1983*. However, on the face of the complaint, the

Respondents are protected by the common law immunity afforded in judicial proceedings. *42 U.S.C. §1983* does not abrogate the absolute immunity existing at common law.

The complaint fails to set forth a cause of action under *18 U.S.C. §1964*. The conduct complained of does not set forth a single act, much less a sufficient pattern of racketeering activity, which is itself subject to criminal sanctions or traditionally criminal in nature sufficient to constitute a predicate act under *18 U.S.C. §1964*. Further, Petitioner fails to allege an injury contemplated by the statute.

ARGUMENT

I. THE CERTIORARI JURISDICTION OF THIS COURT PURSUANT TO *28 U.S.C §1257* HAS NOT BEEN INVOKED.

A. CERTIORARI JURISDICTION OF THIS COURT.

The Supreme Court of the United States, a creation of Article III of the

Constitution of the United States, is a court of limited jurisdiction. The Supreme Court can exercise no appellate jurisdiction except in cases, and in the manner and form defined and prescribed by Congress. *American Construction Company v. Jacksonville T & KWR Company, 143 U.S. 372 (1893), 37 L.Ed. 486, 13 S.Ct. 758 (1893).* The appellate jurisdiction in the federal system is purely statutory. *Heike v. United States, 217 U.S. 423, 54 L.Ed. 821, 30 S.Ct. 539 (1910).*

United States Supreme Court Rule No. 10 states:

> "A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor."

The Petitioner herein has attempted to invoke the jurisdiction of this court under Statute *28 U.S.C. §1257(a)*, which statute allows that the Supreme Court of the United

States *"may"* review *"final"* judgments or decrees rendered by the highest court of a state in conformity with *28 U.S.C. §1257(a)*.[11]

Such jurisdiction of this Court is improper in the instant action, in that the state court judgment sought to be reviewed is not final; does not challenge the validity of a statute of the United States of America; does not challenge the validity of a statute of the State of Florida as being repugnant to the Constitution; and does not deny a federal right specially claimed.

Rather, as will be set forth below, the judgment of the state court is grounded solely upon independent state grounds; dismisses the Petitioner's cause as being in the improper procedural posture under State law, and in no way is decided upon

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[11] See page three above for full text.

federal grounds, as a federal cause of action was not properly presented.

B. THE JUDGMENT IS NOT FINAL WITHIN MEANING OF 28 U.S.C. §1257(a).

The first word in the jurisdictional entitlement of *28 U.S.C. §1257(a)* is the word **final**. A plethora of decisions by this Court turn on the issue of the finality of a particular judgment in a state court. The finality requirement of *28 U.S.C. §1257*, limits the United States Supreme Court's review of state court judgments to "final judgments". It serves to: (1) avoid piecemeal review by federal courts of state court decisions, (2) avoid giving of advisory opinions in cases where there may be no real case or controversy in the sense of Article III of the Constitution and, (3) limit federal review of state court determinations of federal constitutional issues to leave at a minimum federal intrusions in state affairs. *North*

Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 38 L.Ed. 379, 94 S.Ct. 407 (1973).

While recognizing that the determination of finality under *28 U.S.C. §1257* is a question of purely federal law to be resolved by this United States Supreme Court, said determination is to be made by examination to the entire or whole record. *Gotthilf v. Sills*, 375 U.S. 79, 11 L.Ed. 2d 159, 84 S.Ct. 187 (1963); *Construction and General Laborers' Union v. Curry*, 371 U.S. 542, 9 L.Ed. 2d 514, 83 S.Ct. 531 (1963).

A state court judgment in order to be final for the purposes of review by this Supreme Court of the United States must be the final word of the final court in the sense that: (1) it must be subject to no further review or correction in any state tribunal and, (2) it must be effective determination of litigation and not merely

interlocutory or intermediate steps therein. *Market S.R. Company v. Railroad Com. of California*, 324 U.S. 548, 89 L.Ed. 1171, 65 S.Ct. 770 (1945).

The possibility that matters left open by the state court's judgment may generate additional constitutional questions requires a finding that the finality essential to the review of such judgment by the Supreme Court of the United States does not exist. *Republic Natural Gas Company v. Oklahoma*, 334 U.S. 62, 92 L.Ed. 1212, 68 S.Ct. 972 (1948).

The Third District Court of Appeal of the State of Florida affirmed the trial court's dismissal of the Petitioner's complaint. The District Court also directed the Petitioner to seek to amend her complaint in the initial 1976 lawsuit to attempt to include whatever claims she may have. This is not a final order within the purview of *28 U.S.C. §1257*, and

accordingly the jurisdiction of this Court is improper.

What remains to be done is for the Petitioner to amend her complaint in the 1976 action, to attempt to state causes of action under either state or federal law, and allow the court in which the alleged improper conduct took place to make a full and final determination of the issues presented therein. Until such amendment is sought and/or made, there is no "case or controversy" under Article III.

Even if this Court were to accept jurisdiction in this case and render a decision on whether Petitioner did, could, or would state a federal cause of action, nonetheless, the very same issues can and will be presented by the Petitioner in the initial 1976 litigation. Hence this Court runs the very serious and practical risk of condoning and participating in piecemeal litigation. This court would be giving an

advisory opinion where the real "case or controversy" is not properly before this Court, but rather is awaiting the Petitioner's amended complaint in the 1976 action. This would constitute more than a minimum federal intrusion into the State of Florida's procedural affairs in terms of dictating when and where the cause of action is properly brought under state procedural law.

There is more than the mere possibility that there are matters left open by the state court's judgment which may and will generate additional constitutional questions, and that there is something more of substance which remains to be decided at the trial court level of the Florida state courts.

Indeed, the District Court recognized that the litigation was not over, when it said:

"It has been well said that there

> must be some point in every court proceeding when the cause is finally disposed of, its thread cut, and parties out of court...The public welfare demands that there shall be some definite end to litigation--a point sometime, somewhere, when every case is terminated. We cannot afford to return to the interminable and outrageous practice similar to that depicted in Dickens' case of *Jarndyce v. Jarndyce*." *Mabson v. Christ*, 96 Fla. 756, 759, 119 So. 131, 132, (1928). We trust that trial of this cause will occur before the litigation assumes such Dickensian proportions."

Accordingly, the finality requirement of *28 U.S.C. §1257* has not been met and the jurisdiction of this Court thereunder does not lie.

C. THE COMPLAINT DOES NOT RAISE A FEDERAL ISSUE.

Jurisdiction of the Supreme Court to review proceedings of the state courts is not that of a general reviewing court in error, but is limited to ***specific instances of denials of federal rights***, specially set up in state court and denied by the rulings

and judgment of that court. *Auters-Price Oil Company v. Texas*, 212 U.S. 86, 53 L.Ed. 417, 29 S.Ct. 220 (1909).

Such jurisdiction turns upon whether the federal right was ***specially set up*** or claimed in that court and ***denied by its decision***. *28 U.S.C. §1257(a); Parker v. McLain*, 237 U.S. 469, 59 L.Ed. 1051, 35 S.Ct. 632 (1915).

Indeed, federal courts have no power to review judgment of a state court except where a ***substantial*** federal question is involved. *Reich v. Freeport*, 388 F.Supp. 953 (N.D. Ill. 1974). Moreover, a ***real***, and ***not a fictitious*** federal question is essential to the jurisdiction of the Supreme Court of the United States to review a judgment of a state court. *Caldwell v. Texas*, 137 U.S. 692, 34 L.Ed. 816, 11 S.Ct. 224 (1891).

Thus, the next issue with respect to this Court's jurisdiction is whether the

Petitioner has raised a **real** and **substantial** federal question.

It is recognized that the determination of whether a federal question is presented is itself a federal question. *Honeyman v. Hanan*, 300 U.S. 14, 81 L.Ed. 476, 57 S.Ct. 350 (1937).

A plain reading of the complaint[12] fails to disclose the presentment of a claim for the denial of the federal right of access to the courts; fails to disclose a cause of action for Racketeer Influenced and Corrupt Organization violation (RICO); and fails to disclose any other cause of action for denial of the privileges and immunities afforded under the Constitution or its amendments. What one sees when reviewing the complaint is merely an attempted cause of action for fraud based

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[12] The complaint is reproduced in full in the Appendix to this Brief in Opposition.

upon alleged discovery violations in the 1976 lawsuit.

Although the words "under color of state law" appears several times throughout the complaint, they are primarily addressed to the conduct which gave rise to the initial litigation. When these words are used to refer to the conduct which gives rise to the alleged cause of action in the instant case, they are insufficient to properly set forth a ***real*** and ***substantial*** federal question. *Delmar Jockey Club v. Missouri*, 210 U.S. 324, 52 L.Ed. 1080, 28 S.Ct. 732 (1908). No real and substantial federal right was ***specially set up***.

The assertions by the Petitioner in her motion rehearing[13] at the trial court level are untimely and insufficient. *New Orleans Waterworks Company v. Louisiana*

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[13] The motion for rehearing, and the addendum to motion for rehearing are reproduced in the Appendix to this Brief in Opposition.

Sugar Refining Co., 185 U.S. 336, 46 L.Ed. 936, 22 S.Ct. 691 (1902). They lack all color or merit, and have no substance or foundation. The mere fact that the words are raised is not sufficient to invoke the Supreme Court jurisdiction. *Louisiana Sugar Refining Co., supra*.

The manner of raising the federal question is a significant consideration in determining whether jurisdiction will lie. A federal question must have been set up at the proper time and in the proper way. *Jacobi v. Alabama*, 187 U.S. 133, 47 L.Ed. 106, 23 S.Ct. 48 (1902).

The jurisdiction of the United States Supreme Court to review a judgment of the state court cannot be invoked on the ground of denial of a title or right claimed under the Constitution or statute of the United States, unless it is specially set up or claimed at a proper time and in a proper way; and such claim cannot be a matter of

mere inference, but requires averment **so distinct and positive as to place it beyond the doubt that it was intended to assert a federal right**. *Union Mutual Life Insurance Company v. Kirchoff*, 169 U.S. 103, 42 L.Ed. 677, 18 S.Ct. 260 (1898).

The mere averment of a possible federal question in the motion for rehearing and in the Petitioner's briefs, without color or grounds therefore, is insufficient to sustain the jurisdiction of the Supreme Court. *Bowe v. Scott*, 233 U.S. 658, 58 L.Ed. 1141, 34 S.Ct. 769 (1914).

In the instant case, the first mention of any indication that a federal right was possibly being raised was in the Petitioner's motion for rehearing of the Respondent's motion to dismiss. Even there, it was a hollow one line averment that the complaint set forth a cause of action under the RICO statutes. Shortly thereafter, a supplement to the motion for

rehearing was filed containing a mere averment, colorless and unsubstantial, that the complaint set forth a cause of action under *42 U.S.C. §1983*. These untimely, meritless, colorless, frivolous and unsubstantial mere averments of a federal question are insufficient to present a federal issue.

D. THE STATE DECISION DOES NOT TURN ON A FEDERAL ISSUE.

A federal right must be both specially set forth ***and denied***. *Parker, supra*. Where a state court bases its judgment on grounds other than law arising under a federal question, the United States Supreme Court will not take jurisdiction. *DeSaussure v. Gaillard*, 127 U.S. 216, 32 L.Ed. 125, 8 S.Ct. 1053 (1888). The jurisdiction by the United States Supreme Court cannot be sustained where the decision of the state court appealed from was made upon rules of general

jurisprudence, or other grounds, broad enough in themselves to sustain the judgment without considering the federal question appearing in the case but not necessarily involved. *New Orleans v. New Orleans Waterworks Company*, 142 U.S. 79, 35 L.Ed. 943, 12 S.Ct. 142 (1891).

Assuming, *arguendo*, that a federal right was specially set up, it certainly was not denied by the decision to be appealed herein. The state court judgment does not deny any federal rights whatsoever.

Rather, it makes a determination, under state law and applicable to state law claims[14] that: (1) the complaint fails to state a cause of action upon which relief can be granted; (2) an immunity exists; and, (3) if, the Petitioner does or may

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[14] Only state law claims are alleged in the complaint. See I. C., *supra*, and III and IV, *infra*.

have a cause of action, state or federal, that it is properly brought in the initial 1976 litigation where the alleged misconduct occurred.

It is not sufficient to give the Supreme Court jurisdiction that a federal question might have been raised or might have been decided and involved in the case. It must appear, either in direct terms, or by necessary intendment, that it was in fact brought to the notice of the court ***and decided by it***. *Crowell v. Randell*, 35 U.S. 368, 9 L.Ed. 458 (1836). It must also appear that the decision of a federal question was necessary to the determination of the cause and that it was actually decided or that the judgment as rendered could not have been given without deciding it. *Brown v. Atwell*, 92 U.S. 327, 23 L.Ed. 511 (1876).

The Third District Court of Appeal of the State of Florida did not decide federal

questions, nor was it necessary for any federal question to have been decided. Rather, the District Court must have determined that any federal question, if one existed, was not properly brought procedurally. Said causes of action, if any, must be brought in the 1976 litigation by way of an amended complaint.

In the instant case, the District Court rendered its ruling on state law common law immunity and on the improper procedural posture of the case before the court. Indeed the District Court rendered its judgment on grounds of general jurisprudence and other grounds relating to the abuses of the judicial process which have resulted at the hands of the Petitioner throughout the course of this seventeen (17) year morass.

In conclusion, the jurisdiction of this Court under *28 U.S.C. §1257(a)* does not lie in the instant action as a federal

issue was not timely presented herein in a procedural posture so as to allow the state courts to decide it, was not decided by the state court, and the judgment rendered by the state court, lacks the requisite finality.

II. THIS COURT SHOULD EXERCISE ITS DISCRETION IN FAVOR OF DECLINING CERTIORARI JURISDICTION.

Assuming, *arguendo*, that the jurisdiction of this court is properly invoked under *28 U.S.C. §1257(a)*, such jurisdiction is merely discretionary; it is not as of right. The presence of the phrase "may be reviewed" clearly sets forth the discretionary, as opposed to mandatory nature of the jurisdiction. Congress has limited this Court to discretionary jurisdiction through its 1988 amendment of this statute, which disposed of the appeal of right found in subparagraphs 1 and 2 of former 28 U.S.C. §1257 (1970).

Indeed *Rule 10 of the United States*

Supreme Court Rules sets forth the proposition that certiorari is not a matter right but of judicial discretion. It goes on to set forth some general considerations governing the court's exercise of its discretion.

Subparagraph (a) of Rule 10 dealing with actions of Federal Circuit Courts is unquestionably inapplicable to the instant case. Subparagraph (b) deals with a state court's decision which is in conflict with the decision of another state court or of United States Court of Appeal.

The instant decision is in no way in conflict with decisions of another state court or United States Circuit Court of Appeal on any federal question. Rather, no federal question was decided, and the court invited the Petitioner to seek to raise the federal question in the appropriate procedural forum.

Petitioner attempts to convince this

court that the decision sought to be reviewed is in conflict by alleging certain federal cases which discuss the existence or non-existence of common law immunities under federal causes of action. Without fully addressing same herein[15] it is clear that Congress' enactment of *42 U.S.C. §1983* did not intend to abrogate or eliminate traditional common law immunities. *Burns v. Reed*, 111 S.Ct. 1934 (1991).

Subparagraph (c) of the *United States Supreme Court Rule 10* discusses the consideration given in an instance where a state court has decided an **important** question of federal law which has not been decided by the Supreme Court, but should be. This is simply not the case in the instant action as again the state court did not decide a federal question, much less an **important** federal question. Additionally,

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[15] This will be done in Section III below.

this Court has rendered its opinions on the existence or non-existence of immunities and on the elements of a cause of action sounding under *42 U.S.C. 1983* and *18 U.S.C. 1964*.

However looking beyond the technical statutes of jurisdictional entitlement, and rules of judicial discretion, one must merely resort to common sense to determine whether or not this Court should exercise its discretion in favor of declining jurisdiction.

Notwithstanding the discussions of the appropriate elements of a RICO action, or *§1983* action[16], it seems incredulous that the Congress of these United States of America intended for these federally created causes of action to apply to cases such as the instant one.

II(a). ACCESS TO THE COURT?

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[16] Discussed, *infra*, at Sections III and IV.

Our Founding Fathers' creation of the Constitution and the Bill of Rights certainly could not have intended to include the facts in this case when creating the undeniable right of access to the courts. The Petitioner has not been denied access to the courts in any way, shape, or form as was contemplated by the creation of either the Constitution, its amendments, or *42 U.S.C. §1983*.

Ms. Donner has been involved in the initial lawsuit which gave rise to the picketing occurrence; picketed on the steps of the courthouse; filed a lawsuit against the city, the police officer, and her jailors; sought and received access of the courts in the writ of mandamus proceedings, seeking access to the personal litigation files of the city and city attorneys; filed yet another action in state court suing the INITIAL DEFENDANTS together with THE ATTORNEYS; and in each one of these cases

exercised her right of appeal, and rights to seek discretionary review of every layer of court in the State of Florida (eight (8) times); and, now seeks access to this United States Supreme Court.

It is not possible that the Founding Fathers in the creation of the Constitution, nor Congress, through its enactment of the statutes and amendments, nor this Court, in its formulation of federal remedies for federal wrongs, could have possibly intended to create a federal cause of action for denial of access to the courts in favor of a loosing party in a lawsuit who alleges that the other party lied or was untruthful in some way and that that was a possible reason for the loss.

II(b). RICO?

Congress created the Racketeer Influenced and Corrupt Organizations statutes (RICO) for the purposes of doing away with organized crime, the mob. One

must look no further than *Section 1 of Organized Crime Control Act of 1970* which sets forth the purpose of said act as follows:

> "The Congress finds that (1) organized crime in the United States is a highly sophisticated common and diversified and widespread activity that annually drains billions of dollars from America's economy for unlawful conduct in illegal use of force, fraud and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loansharking, theft and fencing of property, imploration and distribution of narcotics and other dangerous drugs and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic process; (4) organized crime activities in the United States weaken the stability of the nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security and undermine the general welfare of the nation and its citizens; and (5) organized

> crime continues to grow because of defects in the evidence gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities to those engaged in organized crime and because of the sanctions or remedies available to the government are unnecessarily limited in scope and impact.
>
> It is the purpose of this act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence gathering process by establishing new penal prohibitions and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."

There is a no set of facts alleged in the Complaint, various briefs on appeal, or in the Petition for Writ of Certiorari filed in this Court which do, or could possibly, allege conduct which Congress intended to eradicate, control and/or penalize under the Racketeer Influenced and Corrupt Organizations Statutes.

II(c). PETITIONER HAS MADE A MOCKERY OF THE JUDICIAL SYSTEM

The Petitioner has attempted to (a) prolong the costly nuisance of these various interminable and harassing lawsuits arising out of a 1975 arrest, and, (b) burden this Court with frivolously asserted non-existent federal issues.

This Court should not lend credence to, or in any way justify these efforts. Accordingly, this court should exercise its discretion in favor of declining jurisdiction over this frivolous and vexatious lawsuit.

III. THE PETITIONER'S COMPLAINT DOES NOT SET FORTH A FEDERAL CAUSE OF ACTION SOUNDING UNDER 42 U.S.C. §1983 FOR DENIAL OF ACCESS TO THE COURTS.

Petitioner argues that she stated a cause of action under *42 U.S.C. §1983* for denial of her rights of access to the courts. The complaint, however, fails to set forth such a cause of action. Rather, the record demonstrates a colorful, yet

disturbing history of Petitioner's abuse of the court system over some seventeen (17) years.

Certainly, the Constitution, and its amendments, provide a right of access to the Courts. *United States Constitution Article IV Section II; Amendments I, V, XIV*. However, the Constitutional right of access to the Court refers only to the right to petition the court for redress of grievances; it does not encompass any right to obtain information to substantiate such a claim. *Doe v. Schneider*, 443 F.Supp. 780 (D.C. Kansas 1978). The cases cited by the litigant are inapplicable to the instant case and fail to set forth the denial of her right to access to the courts, as does her complaint fail to set forth a cause of action for same.

In *Ryland v. Shapiro*, 708 F. 2d. 967 (5th Cir. 1983), the conduct complained of is the destruction of, and/or lack of

effort to investigate, evidence ***prior to any litigation.*** In that case, the plaintiff was prevented, through such destruction or lack of effort from even knowing that a cause of action existed. Due to the information dispersed by the police department, the plaintiff in *Ryland* believed that her daughter had committed suicide. She did not know that her daughter was murdered, due to the failure of the police department to properly investigate, and due to their withholding of information with respect to the shooting incident.

Believing that her daughter's death was the result of a suicide rather than murder, the plaintiff in *Ryland* did not bring any cause of action for wrongful death whatsoever and such a cause of action would have been available to her had the state actors properly investigated and delivered evidence. ***Thus, she was***

prevented from filing an action, and the court determined that such was a impingement upon her federal right of access to the courts. *Ryland, supra*.

In *Harrison v. Springdale Water and Sewer Commission*, 780 F.2d 1422 (8th Cir. 1986), a land owner sufficiently stated a cause of action under *§1983* for infringement of their constitutional rights of access to the courts. The plaintiffs, Harrisons, filed a cause of action against the city for an alleged pollution of their property by the city. The city filed a frivolous condemnation counterclaim "as a tactical move to put pressure on the Harrisons to settle their damages claim against the city". The allegations in the complaint were such that the city had no plan for using the property, that the conduct was purely vexatious and harassing and was totally without legal basis. This conduct, (much like denying certain basic

privileges to prisoners who file habeas corpus actions) constitutes a denial of access to the courts.

The court reasoned that the conduct has a chilling effect on the particular litigant in question, as well as other litigants who may choose to file an action. *Harrison* essentially is a federal cause of action for malicious prosecution, and/or for what happens to habeas corpus prisoners (i.e. penalizing, chilling, and otherwise preventing persons from seeking redress of grievances in the court system.)

The instant case is factually distinguishable from the *Harrison v. Springdale Water and Sewer Commission*, *supra*, case as well. Here, the actions by the INITIAL DEFENDANTS could not possibly constitute an affirmative claim or frivolous or vexatious claim against the Petitioner. The conduct of the INITIAL DEFENDANTS cannot constitute conduct

designed to, or having the effect of, punishing the Petitioner for her attempt to access the courts for redress of grievances or having a chilling effect on her or other persons similarly situated such that they could not or would not access the courts.

Further, the complaint does not allege that the conduct was taken in retaliation for the Petitioner having exercised her constitutional rights to seek judicial relief. Nor did the complaint allege that the actions have had such a chilling effect. Rather, the only thing that the complaint alleges is that the INITIAL DEFENDANTS and THE ATTORNEYS answered interrogatories and requests for production which answers the Petitioner alleges were untrue, and hindered her ability to win her case.

It is somewhat surprising that Ms. Donner could be possibly be heard to complain that her federally guaranteed

right of access to the courts has been hampered. She has now filed three (3) lawsuits and in each has exercised her right to appeal (eight (8)) at all levels of the state courts. Indeed she now seeks and has access to this Court to redress her grievances.[17]

It must be pointed out that though there is a constitutional right to access the courts:

> "The right of access to the courts is neither absolute nor unconditional, and there is no constitutional right of access to the courts to prosecute an action that is frivolous or malicious. No one, rich or poor, is entitled to abuse the judicial process. *Tripati v. Bemanan*, 878 F. 2d 351 (10th Cir. 1989)." (Citations omitted.)

Based upon her complaint, briefs and Petition, no federal rights, privileges or immunities were deprived by the alleged

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[17] Of course, the Respondents assert that this Court either lacks jurisdiction, or should not accept it.

conduct, other than the Petitioner's federal right of access to the courts.

One need not look at the immunity issue presented by the Petitioner as she has failed to state a cause of action for denial of access to the courts notwithstanding any potential defenses.

However, in that the Petitioner does, at great length, discuss the issue of immunity in her Petition, same will be addressed herein under *United States Supreme Court Rule 15.1*.

The Petitioner's reliance on *Howlett v. Rose*, 537 So.2d 706 (Fla. 2d DCA 1989), is most inapplicable. In *Howlett*, the state court determined that a arm of the state, a county school board, was entitled to an absolute sovereign immunity in an action brought by a minor under *42 U.S.C. §1983*. The state court determined that the question of whether sovereign immunity exists is a question of state law and not

federal law.

This Court in *Howlett v. Rose*, 110 S.Ct. 2430 (1990) correctly ruled that the state court as a court of general jurisdiction was compelled to hear federal based causes of action, and that the state statutory assertion of sovereign immunity was not applicable to federally based causes of action. This Court reaffirmed its holding in *Martinez v. California*, 444 U.S. 277 (100 S.Ct. 553), 62 L.Ed. 2d 481 (1980). There, it was held that a state cannot immunize an official from liability for injuries compensable under federal law. That point is not argued herein.

Rather, the position of the Respondents is that there are long standing common law immunities which apply to cases brought under *42 U.S.C. §1983*, as they do to other actions. *Burns, supra; Briscoe v. LaHue*, 460 U.S. 325 (1983). Those common law immunities which existed prior to the

enactment of *42 U.S.C. §1983* have not been abrogated by its creation. *Burns, supra.* There has long since been an immunity afforded to litigants for litigation related conduct. Such common law is well established in the various Florida cases cited by these Respondents in their previous briefs, and indeed by the Third District Court of Appeal decision. These common law immunities have long since stood and are not abrogated by the creation of the federal cause of action. *Burns, supra.*

The Petitioner's complaint fails to set forth a cause of action for denial of access to the courts and further, assuming *arguendo* that the complaint does set forth denial of that or some other federal right, the absolute immunity afforded to the litigants bars such an action. *Robertson v. Industrial Insurance Company*, 75 So.2d 198 (Fla. 1954); *Meyers v. Hodges*, 44 So. 357 (Fla. 1907); *Ponzoli and Wassenberg v.*

Zuckerman, 545 So.2d 309 (Fla. 3d DCA 1989); *Perl v. Omni International of Miami, Ltd.*, 439 So.2d 316 (Fla. 3d DCA 1983); *Sailboat Key, Inc. v. Gardner*, 378 So.2d 47 (Fla. 3d DCA 1979); *Regal Marble, Inc. v. Drexel Investments, Inc.*, 515 So.2d 1015 (Fla. 4th DCA 1987); *Wright v. Yurko*, 446 So.2d 1162 (Fla. 5th DCA 1984). Those privileges and immunities appear on the face of the complaint and accordingly the complaint fails to set forth a cause of action upon which relief can be granted. *Flye v. Jeffords*, 106 So.2d 228 (Fla. 1st DCA 1958).

The reasoning of these rules of law are both sound and well established. The courts have stated:

> "The policy reasons for the privilege have often been repeated:
>
> > 'In fulfilling their obligations to the clients and to the court, it is essential that lawyers, subject

> only to the control by the trial court and the bar, should be free to act on their own best judgment in prosecuting or defending a lawsuit without fear of later having to defend a civil action for defamation for something said or written during the litigation.' " *Ponzoli, supra at 310.* (Citations omitted.)

The common law of immunity extends to actions sounding not only in defamation but in fraud and as stated in *Perl*, citing *Robertson*, by reasoning:

> "The grounds upon which the rule of absolute privilege is sustained as to judicial proceedings is that all persons connected with the proceedings should be free from fear of being called upon to defend suits arising as a result of derogatory disclosures and that to permit such suits would result in a circuitry of actions by which the same issues tried in the judicial proceedings could be retried." *Perl, supra, at 318.* (Citations omitted.)

That is exactly was is going on here.

The Petitioner believes that she has been wronged during the 1976 litigation discovery process. Any wrongs, and their remedies, be they under state, or federal law, should be addressed in the original 1976 litigation to avoid circuitousness and, a multiplicity of suits, and to ensure the correct procedural forum.

The repercussions of the conduct of THE ATTORNEYS and the INITIAL DEFENDANTS should be left to the discretion of that court wherein the alleged conduct has occurred; be that either by a state or federal cause of action or remedy; through contempt proceedings; sanctions; and/or through admonishment by the state bar. *Buchanan v. Miami Herald Publishing Company*, 237 So.2d 9 (Fla. 1969); *Wright, supra, at 1164.*

IV. PETITIONER'S COMPLAINT DOES NOT SET FORTH A FEDERAL CAUSE OF ACTION SOUNDING UNDER 18 U.S.C. §1964 FOR A FEDERAL RICO VIOLATION IN THAT IT FAILS TO ALLEGE

SUFFICIENT CRIMINAL PREDICATE ACTS, AND FAILS TO ALLEGE AN INJURY RECOGNIZED BY RICO STATUTES.

The RICO statutes were not designed to encompass this case[18] even assuming each and every allegation of the Petitioner as being true and taking each and every inference therefrom in favor of the Petitioner. This simply isn't what RICO stands for.

However, to the extent that RICO is thoroughly discussed by Petitioner, counter argument shall be presented herein pursuant to *United States Supreme Court Rule 15.1.*

The complaint fails to state a cause of action for a civil remedy under the Federal RICO Statutes, *18 U.S.C. §1961-1964* and was appropriately dismissed. The Petitioner's complaint does not allege any criminal predicate acts to qualify for RICO. The Petitioner attempts to allege a

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[18] See II(b).

pattern of mail fraud by claiming the INITIAL DEFENDANTS, through THE ATTORNEYS made written misrepresentations to her, during litigation, which were sent through the United States mail. [See Appendix A-1 through A-21, subparagraphs 8(a) through (h), 22, 23, 24, and 29.] The issue is not whether there were misrepresentations in the discovery. The issue is solely whether the mailing of such discovery is mail fraud as defined in *18 U.S.C. §1341*. The answer is no. As there was no mail fraud the complaint fails to allege predicate acts and, therefore, the complaint was appropriately dismissed.

The act of sending even false answers to interrogatories and responses to request for production through the mail does not violate the Federal Mail Fraud Statute. *18 U.S.C. §1964* allows a civil remedy for any person injured in his business or property by reason of a violation of *18 U.S.C. §1962*

(RICO). *18 U.S.C. §1962* prohibits, among other things, "patterns of racketeering activity" as "...any act which is indictable under...*18 U.S.C. §1341* (relating to mail fraud)". Pursuant to *18 U.S.C. §1961*, the predicate act complained of (mail fraud) must be indictable under the appropriate statute (*18 U.S.C. §1341*, mail fraud). The "racketeering activity" must be an act in itself subject to criminal sanctions. It must be an act or practice which is treated, traditionally, as criminal in nature. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 105 S.Ct. 3275 (1985); *Kleiner v. First National Bank*, 526 F. Supp. 1019 (M.D. Ga. 1981). Sending responses to discovery, whether false or not, through the mail, is an action which is not indictable, not subject to criminal sanctions and has not been treated traditionally as criminal in nature.

Courts have specifically held an

attorney's (or party's) action of sending even false statements through the mail during litigation is not punishable under the Mail Fraud Statute. To allow such action would chill the ability of attorneys (or parties) to adequately and zealously represent their clients interests in litigation, *McMurtry v. Brasfield*, 654 F. Supp. 1222 (E.D. Ba. 1987). In *Spiegel v. Continental Illinois National Bank*, 609 F. Supp. 1083 (D.C. Ill. 1985) where the RICO claim involved a predicate act of an attorney sending a false statement to another attorney through the mail during litigation, the court stated:

> "In the view of the court, false statements made between attorneys in the context of pending litigation are outside the scope of the Mail Fraud Statute. No fiduciary duty exists and the parties are dealing at arms length. The appropriate remedy in such a case would be to lodge a Complaint with the appropriate disciplinary body or apply to the court for assistance. A RICO action for treble damages is

hardly an appropriate solution." *McMurtry*, at *supra*.

In discussing the same issue, the Court in *McMurtry* stated that subjecting such correspondence to a Mail Fraud Statute would chill an attorney's effort and duty to represent his client during the course of pending litigation, and, as in the case at bar, give birth to collateral suits. Therefore, as the predicate acts alleged in the complaint are not indictable under the Mail Fraud Statute, the complaint failed to state a claim for civil RICO and was appropriately dismissed.

Petitioner cites *U.S. v. Peters*, 732 F.2d 1004, (1st Cir. 1984), in support of her position that mailing of interrogatory answers gives rise to a RICO violation. That case involves two defendants who were charged with the criminal RICO violations for committing arson of their warehouse and attempting to collect on the insurance

policies. They mailed sworn statements of loss in furtherance of their arson/insurance fraud conspiracy. The defendants therein, the Court held, knew that as a furtherance of their initial criminal conspiracy, "their attorneys would send the insurance claims forms and interrogatory answers through the mail or that the Defendants knew these mailings would follow in the ordinary course of business." Arson and insurance fraud are acts traditionally considered criminal in nature. *Peters* is inapplicable to the instant case.

Petitioner also cites *U.S. v. Vaughn*, 797 F.2d 1485 (9th Cir. 1986) as supporting her contention that an attorney is susceptible to a mail fraud conviction for a petition and follow up letters he knew to be false. There, the attorney was charged with conspiracy to import marijuana, aiding and abetting importation of marijuana and

making a false statement to a government agency together with the four counts of mail fraud. The attorney was involved with the conspiracy to import marijuana and in furtherance of the conspiracy to import marijuana (traditionally a criminal act) the attorney submitted petitions and false documents to federal agencies to obtain the aircraft used to smuggle the drugs. *Vaughn* is inapplicable to the instant case.

Finally, Petitioner sets forth the case of *U.S. v. Leyden*, 842 F.2d 1026 (8th Cir. 1988). *Leyden* does not hold that mailing of a pleading can serve as the basis for a mail fraud prosecution. Rather, *in Leyden*, the mailing of the insurer's responsive pleading was held <u>not</u> to serve as a basis for a mail fraud prosecution. Even still, *Leyden* also dealt with a criminal prosecution arising under a predicate act of arson for the purposes of insurance fraud.

The Petitioner's complaint also fails to state a cause of action as the injury claimed is not one recognized under the RICO Statutes. *18 U.S.C. §1964(c)* provides that a person may sue who is injured in his "business or property" by reason of a violation of *§1962*. Congress did not intend for victims of predicate acts to recover for all types of injuries suffered. Therefore, the limitation. *Sedima, supra; Grogan v. Platt*, 1835 F.2d 844 (11th Cir. 1988). Personal injury claims are not injuries to business or property and are precluded. *Sedima, supra; Grogan, supra.*

The Petitioner's complaint alleges damages in the 1976 civil complaint, out of which this action arises, solely for personal injuries. The complaint alleges that damages for the personal injury claim would have been more had it not been for the alleged misrepresentations. Therefore, the damages are claimed for personal

injuries. As the complaint fails to state a cause of action for civil RICO, it was appropriately dismissed.

CONCLUSION

The Petitioner has failed to, and cannot properly invoke the jurisdiction of this Court under *28 U.S.C. §1257(a)*. Indeed, even if said jurisdiction could be invoked, this Court should exercise its discretion in favor of declining jurisdiction over this frivolous, vexatious, colorless and meritless lawsuit. Nothing presented by the Petitioner in any way sets forth a real federal cause of action, much less one which is substantial or important. The Founding Fathers and Congress in no way intended the federal Constitution, statutes and remedies to apply to this Petitioner or to the conduct complained of in this case.

Wherefore, the Respondents herein

respectfully request that this Court dismiss the petition for want of jurisdiction, and/or in the alternative exercise its discretion and decline its jurisdiction over this matter.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 24th day of February, 1992, to: E. S. CORLETT, III, ESQUIRE, 116 West Flagler Street, Miami, FL 33130; and to MIRIAM DONNER, Post Office Box 1232, Hallandale, FL 33008-1232.

Respectfully submitted,

David Kleinberg, Esquire
GAEBE, MURPHY, MULLEN
ANTONELLI & GERLIN
420 South Dixie Highway
Third Floor
Coral Gables, FL 33146
Tel.: (305) 667-0223

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 89-37625 CA 17

MIRIAM DONNER,

Plaintiff,

v.

COMPLAINT

APPALACHIAN INSURANCE COMPANY, a Rhode Island corporation, CITY OF MIAMI, VERNON HETHERINGTON, FOWLER, WHITE, BURNETT, HURLEY, BANICK & KNIGHT, P.A., a/k/a FOWLER, WHITE, BURNETT, HURLEY, BANICK & STRICKROOT, P.A., a Florida professional association, PHILLIP W. KNIGHT, and MICHAEL J. MURPHY,

Defendants.
_____/

Plaintiff Miriam Donner sues Defendants Appalachian Insurance Company, a Rhode Island corporation (hereinafter referred to as Appalachian), City of Miami (hereinafter referred to as the City), Vernon

Hetherington (hereinafter referred to as Hetherington) Fowler, White Burnett, Hurley, Banick & Knight, P.A. a/k/a Fowler, White, Hurley, Banick & Strickroot, P.A., a Florida professional association (hereinafter referred to as the P.A.), Phillip W. Knight (hereinafter referred to as Knight) and Michael J. Murphy (hereinafter referred to as Murphy) and alleges:

1. (a) This is an action for damages in excess of $5,000, exclusive of interest, attorney's fees and costs.

(b) Appalachian is an insurance company authorized to do business in the state of Florida.

2. In Case No. 76-8301 filed in the above-styled Court, Plaintiff Miriam Donner sued Defendants City of Miami Police Officer Hetherington, the City, Appalachian, Metropolitan Dade County (hereinafter referred to as Dade County), certain Dade County correctional officers, et al.

3. In that suit, plaintiff alleged inter alia that

(a) While she was exercising her First Amendment rights to picket and gather signatures upon a petition, she was falsely arrested on a criminal charge of breach of peace, imprisoned by Hetherington, acting within the course and scope of his employment as a City Police Officer, and deprived of her civil rights under color of state law;

(b) as a result of that arrest, she was imprisoned in the Dade County Women's Annex as a pretrial detainee for five days;

(c) while so imprisoned, the personnel of that Annex, acting within the course and scope of their employment as employees of Dade County and under color of state law, physically assaulted her, stripped her naked, and left her penned in a cold solitary cell (all in full view of male prison personnel) without clothing,

blankets, towels, linen, medical attention, exercise facilities, soap, toilet paper, running water, other elements or personal hygiene or operable toilet for about four days;

(d) after hearing the testimony of arresting Officer Hetherington, the court granted Donner's motion to dismiss the criminal charges lodged by Hetherington against her and dismissed those charges;

(e) as a result of the foregoing, she suffered mental anguish, humiliation, disgrace, physical pain and embarrassment, for which she sought damages, (compensatory damages against all defendants and additional punitive damages against the individual defendants).

3. Since Appalachian had issued a liability insurance policy to the City and its police officers for the policy period including the dates of the incidents alleged in the complaint, Appalachian was joined as

a defendant in that suit in its capacity as liability insurer of the city and of Hetherington in regard to the claims asserted.

4. Knight, Murphy, Fred Ober, and Greg Gaebe respectively were attorneys employed by the P.A., a professional association engaged in the practice of law. Knight was at all relevant times a partner in the P.A. until his separation from the P.A. in 1979. Murphy became a partner in the P.A. before his separation in 1985 but the date of inception of his partnership position is unknown.

5. Appalachian retained, maintained, and supervised the legal services of the P.A. to represent Appalachian, the City and Hetherington in regard to the claims asserted in Case No 76-8301.

6. (a) In particular, the P.A. did appear in that case in behalf of those defendants through attorneys Knight, Murphy,

Fred Ober, and Greg Gaebe.

(b) Moreover, Knight and the P.A. appeared in that case in behalf of Dade County and the Dade County correctional officers.

7. The City, Hetherington, and Appalachian asserted in their answers various defenses.

8. In the course of pretrial discovery proceedings in that case and under color of state law, the City, Hetherington, Appalachian, the P.A., and Knight, in conspiracy with one another, engaged in a scheme and pattern of fraudulent misrepresentation to plaintiff and to the Court through service by mail of papers through the U. S. Postal Service, including inter alia the following:

(a) the City's April 12, 1976 answers to interrogatories nos. 4,6, and 7 (served with the complaint) served upon plaintiff by P.A. through Knight (representing that

witnesses to the arrest incident were "unknown" and that insurance coverage is "unknown");

(b) Hetherington's May 25, 1977 answers to interrogatories nos. 5, 5c, and 7 served upon the plaintiff by the P.A. through Knight (representing as the only insurer Appalachian and representing that the only statement given by Hetherington concerning the incident was a July 1, 1975 statement to Officer P.F. Kumalae);

(c) March 20, 1978 letter from Knight and the P.A. in behalf of the City to the Court (representing that the City had only two statements of its officers with regard to that incident and that all such statements were being supplied to the Court pursuant to its discovery order);

(d) service upon plaintiff of the March 21, 1978 response of the City through its attorneys, the P.A., and Knight, to plaintiff's request for production nos. 3

and 9 (representing that all records requested in those requests and ordered to be produced in the aforementioned discovery order had been produced);

(e) their March 31, 1978 reservice upon plaintiff and refiling of the said March 21, 1978 response;

(f) service upon plaintiff of the May 8, 1978 response of the City through its attorneys, the P.A. and Knight, to plaintiff's request for production (again representing that all of the records ordered to be produced in that discovery order had been produced);

(g) service upon plaintiff of Hetherington's and the City's 1978 response to plaintiff's motion for sanctions (again repeating the aforementioned representation);

(h) service upon plaintiff of Hetherington's and the City's July 21, 1978 response to plaintiff's request for

production (representing the limits of insurance coverage).

9. Those representations were false. Among the false aspects of those representations were the following:

(a) (i) the names and addresses of witnesses to the arrest incident (i. e. John McBride and Bill Urbiza) were known to the defendants, to the P.A., and to Knight ever since 1975;

(ii) those witnesses were no longer available to provide testimony when finally plaintiff was able through other means to learn their names;

(b) (i) in addition to the single July 1, 1975 statement of Hetherington and single June 23, 1975 statement of Officer Parker that were produced and disclosed, other statements were at all relevant times known to, and in the custody and control of, the defendants; included inter alia among those concealed statements were the following:

Hetherington and Officer Parker, on May 6 and May 7, 1975 respectively, executed written statements to Sargeant Chapek about the arrest incident, supplied to the P.A., to Knight, to Appalachian, and to the City, that were concealed in Hetherington's aforementioned answers to interrogatories and in the City's and Hetherington's aforementioned responses;

(ii) while the June 23, 1975 and July 1, 1975 statements that were produced both contained an allegation that plaintiff stated she wanted to be arrested, the earlier statements that were withheld omitted any such allegation; moreover, the withheld May 6, 1975 statement served to confirm the time of arrival of Hetherington on the scene of the arrest;

(iii) Hetherington stated under oath that the June 23, 1975 and July 1, 1975 statements that the City produced were not authentic;

(c) two liability policies issued by Columbia and California Union Insurance Company affording $1,000,000 limits and a $5,000,000 limit policy issued by Houston General Insurance Company to the City and to its police officers covering the period during which the arrest of plaintiff took place and covering the claim was concealed;

10. Those representations were known by the respective defendants to be false when made or alternatively were made without knowledge of whether they were true or false.

11. Those representations were made with the intention that plaintiff should rely upon them as true.

12. Those representations were material to the preparation and presentation of plaintiff's case for trial, not only against these defendants, but also against Dade County and the Dade County correctional officers joined as defendants.

13. Plaintiff relied upon the truth of those representations in preparing and presenting their case for trial to her detriment.

14. If defendants would have truthfully disclosed the that aforementioned withheld statements existed and were in the custody and control of the City, Appalachian, Hetherington, the P.A. and Knight, plaintiff could have effectively argued to the Court that discovery sanctions, including the entry of default, should be imposed upon the City and Hetherington for their violation of the prior discovery order requiring the production of those statements.

15. At the April, 1980 trial of that case, the P.A., Ober, and Murphy (and the office of the Dade County Attorney) appeared in behalf of the defendants.

16. (i) At that trial, Hetherington testified that plaintiff told him at the time of arrest that she wanted to be

arrested and sought to cast doubt upon plaintiff's evidence of his time of arrival on the scene of the arrest.

(ii) A central element in plaintiff's proofs was that Hetherington's time of arrival was at "1420", the same time as the arrest.

(iii) Hetherington had testified that in his mind plaintiff's conduct when he first observed her was in a gray area, not enough to form the basis for an arrest but contrary to the notations on the arrest report and on his worksheet he variously testified at trial that he did not then arrest her or that he arrived earlier on the scene.

(iv) Plaintiff alone was able to testify on the other hand that Hetherington arrested her immediately without any probable cause and that she did not state that she wanted to be arrested;

(v) If plaintiff would have had access to the records withheld as a result of the foregoing misrepresentations and if defendants would not have falsely represented under oath that the remaining statements were not authentic, plaintiff could have conducted further pretrial discovery to uncover evidence that plaintiff could have introduced at trial to impeach and contradict Hetherington's testimony and plaintiff could have produced evidence impeaching and contradicting that testimony.

(vi) Although the P.A., Ober and Murphy were fully cognizant of the prior scheme or pattern of fraudulent misrepresentations, in furtherance of that scheme, under color of state law, and in conspiracy with one another and with the other defendants, they continued to conceal from plaintiff the truth and to avail their clients at trial of the advantage thereby gained.

17. (a) At that trial, the Court directed a verdict in favor of the City, Hetherington and Appalachian and entered judgment on that verdict in favor of those defendants.

(b) If defendants would not have committed the aforementioned fraudulent misrepresentations, plaintiff could have presented additional evidence at trial that would have avoided the entry of that directed verdict and the necessity, expense, and mental anguish of the appeal that was thereby necessitated.

18. That verdict and the ensuing judgment in favor of those defendants was reversed on appeal.

19. At that trial, after the verdict was directed, plaintiff's claims against Dade County and the Dade County correctional officers were submitted to the jury.

20. In closing argument to the jury, the Dade County Attorney generally attacked

plaintiff's credibility and specifically pointed out to the jury Hetherington's testimony that plaintiff allegedly stated she wanted to be arrested and he argued to the jury that since she wanted to be arrested she was not entitled to any substantial damages for the conditions of her incarceration.

21. The jury returned a verdict in favor of plaintiff and against the remaining defendants but, as a result of those fraudulent misrepresentations, only in the sum of Fifteen Thousand Dollars.

22. (a) In furtherance of the aforementioned scheme or pattern of fraudulent misrepresentations, with knowledge of the fraudulent character of those representations, and in conspiracy with one another and with the other defendants, Murphy and the P.A., acting in behalf of Hetherington, Appalachian and the City, under color of state law, falsely

represented to plaintiff and to the Court at an October 23, 1981 hearing that defendants are not trying to hide anything and are not claiming any privilege that plaintiff can have any records she wants so long as the request is channeled through Murphy.

(b) On October 28, 1981, plaintiff made a public records demand upon the City of Miami Attorney and upon the P. A. and Murphy to produce their respective case files relating to the claims asserted in Case No. 76-8301.

23. Included in those case files were all of the aforementioned statements, records referring to those statements, records confirming defendants' knowledge at all relevant times of the existence of those records and of the existence of the aforementioned withheld names and addresses of witnesses and of the existence of the aforementioned withheld liability insurance policies.

24. In response to that request, in order to conceal that scheme or pattern of fraudulent misrepresentations, and in order to deprive plaintiff of her claims asserted in Case No. 76-8301, the City and the P. A. and Murphy, acting in conspiracy with one another and with the other defendants and acting in behalf of and in concert with the City and under color of state law, responded that the demanded records would be produced only when donkeys fly.

25. As a result, plaintiff as Relator was forced in 1981 to initiate a mandamus proceeding (Case No. 81-369 EX later renumbered as Case No. 83-9287 CA 26) against Respondents Assistant City Attorney Steve Edelstein, Murphy, the P. A., and the City to gain access to those records.

26. That proceeding was litigated at all levels of the Florida court system over a period of four years and finally resulted

in the issuance of a writ of mandamus requiring those Respondents to produce the demanded public records.

27. For the first time, on August 19, 1985, plaintiff received notice of the entry of that writ and on that date Respondents produced to plaintiff for inspection certain of the demanded records.

28. During the pendency of the public records mandamus preceeding, Case No. 76-8301 was stayed.

29. In furtherance of that scheme or pattern of fraudulent misrepresentations and of the said conspiracy, Appalachian financed the P. A.'s and Murphy's defense of the mandamus proceeding.

30. As a further result of that scheme or pattern of fraudulent misrepresentation, the said conspiracy and the aforementioned efforts to conceal them and the resulting delays and litigation,

(a) plaintiff has incurred emotional stress, mental anguish, and aggravation of a prior physical condition, to-wit, headaches;

(b) relevant evidence useful to plaintiff in the prosecution of her claims (including claims for violations of her civil rights) has been lost;

(c) the memories of material witnesses useful to plaintiff in the prosecution of her claims (including claims for violations of her civil rights) have prejudicially faded;

(d) plaintiff devoted substantial time to the prosecution of the said discovery efforts and to the public records proceeding.

Wherefore, plaintiff demands judgment against defendants for triple compensatory damages, for punitive damages, for any attorney's fees that may be incurred in the

prosecution of this action, and for her costs.

MIRIAM DONNER, Plaintiff
P. O. Box 1232
Hallandale, Florida 33009

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR DADE COUNTY FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 89-37625 CA 17

Miriam Donner,	*
	*
Plaintiff,	*
	*
vs.	*
	*
APPALACHIAN INSURANCE COMPANY, a Rhode Island corporation, CITY OF MIAMI, VERNON HETHERINGTON, FOWLER, WHITE, BURNETT, HURLEY, BANICK & KNIGHT, P.A., a/k/a FOWLER, WHITE, BURNETT, HURLEY, BANICK & STRICKROOT, P.A., a Florida professional association, PHILLIP W. KNIGHT, and MICHAEL J. MURPHY,	*
	*
Defendants.	*
	*

PLAINTIFF'S MOTION FOR REHEARING

Plaintiff Miriam Donner moves the Court to rehear its order entered March 27, 1990 and upon rehearing to set aside or alternatively amend that order in accordance with the following grounds.

PLAINTIFF'S OBJECTION TO PURPORTED VERIFICATION OF MOTION

In entering that order, the Court may have overlooked Plaintiff's March 5, 1990 "Objection" to defense counsel's purported "verification" of Defendants City of Miami's and Hetherington's motion to dismiss. That verification was not stated to be on personal knowledge and no facts were alleged that showed it to be on personal knowledge. Moreover, that motion contains merely legal conclusions and no factual assertions. Nor was that motion supported by any documentation.

In entering that order, the Court may also have overlooked that, in any event, one may not look beyond the four corners of the allegations of the complaint to determine whether the complaint states a cause of action. Any alleged res judicata, collateral estoppel, limitations, or waiver is a matter in avoidance that must be pleaded as an

affirmative defense; such an affirmative defense may not be interposed in a motion to dismiss unless the allegations of the complaint are alone sufficient to affirmatively establish that defense. The allegations of the instant complaint do not establish any such defenses.

In entering that order, the Court may have overlooked that, with regard to the statute of limitations, paragraph 17 of the complaint clearly sets out that the date when certain allegedly concealed records were made available to plaintiff and therefore the date when first the alleged fraud could have been discovered was not before August 19, 1985, just four years before the date of commencement of suit (Monday August 21, 1989). A plaintiff is under no obligation to anticipate the defense of the statute of limitations by alleging the "date of discovery" in the complaint.

In entering the order, the Court may have overlooked that, with regard to the claim of res judicata or collateral estoppel, the only judgments alleged in the complaint are (a) plaintiff's money judgment against Dade County in Case No. 76-8301 and (b) the writ of mandamus issued against the City of Miami, Murphy, Fowler, White, and Assistant City of Miami Attorney Edelstein in the public records proceeding, Case No. 83-9287. The allegations of the complaint do not affirmatively demonstrate that there is any "privity" between Dade County and the City, City of Miami Police officer Hetherington, the City's insurer Appalachian, Fowler, White, Knight, or Murphy that would in any manner entitle defendants to set that judgment up as collateral estoppel or res judicata in the case at bar. Moreover, any collateral estoppel effect of the peremptory writ of mandamus in Case No. 83-9287 would

necessarily reinforce plaintiff's claims in the case at bar that she was entitled to access to the records held to be public records that were allegedly concealed from her in Case No. 76-8301. No aspect of that writ in any way detracts from plaintiff's instant cause of action. The complaint does not disclose that the instant claims for damages could have been joined in that mandamus proceeding, first because of the nature of that proceeding and second because defendants' alleged conduct complained of in the complaint is not alleged to have been discovered when that proceeding was commenced. No evidence outside the four corners of the complaint can be considered on a motion to dismiss in support of defendants' claim that the action is barred by res judicata or estoppel by judgment.

In entering that order, the Court may have overlooked that, in Wilson v. Wahl, 383 So. 2d 311 (Fla. 2d DCA 1980), the Second

District reversed an order of dismissal, aptly holding:

> It appears that the order of dismissal was entered because there was another action pending between the parties in another division of the same court involving questions of law and fact common to those raised by the complaint in the case at bar. Under these circumstances, we think that administration of justice is best served by an order which averts the piece-meal handling of the claims between the parties. An order which consolidates the actions, rather than the order which dismissed the instant action will effect that desired result.
> ...Fla.R.Civ.P. 1.270. (Emphasis added)

That decision recognizes the inappropriateness of dismissal just because it is alleged that another already-pending action involves common or overlapping questions of law or fact.

In entering their order, the Court may have overlooked that the allegations of the instant complaint clearly state claims upon which relief may be granted. Among the

causes of action stated are

(a) common-law fraud; all the elements of such an action are fully alleged [see allegation in paragraphs 8(a)-(h), 9(a)-(c), 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, and 30 of complaint];

(b) common-law conspiracy (see paragraphs 4, 5, 6, 8, 16(vi), 24, and 29 of complaint);

(c) an action modeled after Bondu's action against Cedars of Lebanon Hospital approved in Bondu v. Gurvich, 473 So.2d 1307, 1312-1313 (Fla. 3d DCA 1984), rev. denied, 484 So.2d 7 (Fla. 1986) (patient may sue hospital for hospital's loss of records statutorily required to be maintained by the hospital where that loss allegedly resulted in the summary judgment in favor of doctor in patient's medical malpractice suit against that doctor); all of the elements of

a Bondu-type[1] suit are alleged [see paragraphs 8(c), (d), and (f), 9(b)(i) and (ii), 14, 16(v), and 17(b), and 26 of complaint; Sec. 119.01, 119.041, and 119.07, Fla. Stat. (1975). See also Sec. 119.01, 119.041, 119.07, Fla. Stat. (1975); and Edelstein v. Donner, 471 So.2d 26 (Fla. 1985)];

(d) an action under 18 U.S.C. Sec. 1964(c) (Civil RICO), based upon defendants' alleged use of the mails in furtherance of their alleged pattern of conduct, Tafflin v. Levitt, ____ U. S. ____ (Case No. 88-1650, Opinion filed January 22, 1990) (state courts have jurisdiction over federal civil RICO actions; "many RICO cases involve asserted violations of state law, such as state fraud claims") (see paragraphs 8, 8(a)-(h), 22, 23, 24, and 29 of complaint).

In entering its order, the Court may

---

[1] Bondu v. Gurvich, 473 So.2d 1307.

also have overlooked that, contrary to the arguments advanced in paragraphs 9 and 10 of the City's motion to dismiss, the doctrine of sovereign immunity does not insulate the City from a federal civil RICO action and therefore Sec. 768.28, and its limitations have no bearing upon the City's liability. The Supremacy Clause of the U. S. Constitution gives priority to the federal, not the state, statute. See Felder v. Casey, 108 S. Ct. 2302 (1988).

If the order was based upon a determination that the complaint was somehow deficient in setting out a cause of action, the Court may have also overlooked the fact that plaintiff was entitled to at least one opportunity to amend and that the said order erroneously failed to grant leave to amend.

Finally, the said order, as worded, is inconsistent.

For all of the foregoing reasons, rehearing should be granted and on rehearing

the said order should be set aside or modified to comport with the foregoing principles of law.

I HEREBY CERTIFY that true copies of the foregoing were mailed to David Kleinberg, Gaebe, Murphy, Mullen & Antonelli, 4601 Ponce de Leon Blvd. Ste. 100 Coral Gables, Fla 33146 and to E. S. Corlett III 116 W. Flagler St. Miami, Fla 33130 this 5th day of April, 1990.

P. O. Box 1232
Hallandale, Florida
33008-1232

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR DADE COUNTY FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 89-37625 CA 17

MIRIAM DONNER,

Plaintiff,

v.

ADDENDUM TO MOTION FOR REHEARING

APPALACHIAN INS. CO., et al.
Defendants
_____/

Plaintiff Miriam Donner files as an amendatory addendum to her motion for rehearing the additional grounds that the complaint also states a cause of action under 42 U. S. C. Sec. 1983.

I HEREBY CERTIFY that true copies of the foregoing were mailed to David Kleinberg 4601 Ponce de Leon Boulevard Suite 100 Coral Gables, Florida 33146 and to E. S. Corlett

III 116 W. Flagler Street Miami, Florida 33130 this 6th day of April, 1990.

P. O. Box 1232
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33008-1232

Supreme Court, U.S.
FILED
MAR 26 1992
OFFICE OF THE CLERK

(3)

NO. 91-1227

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

MIRIAM DONNER,

Petitioner,

vs.

APPALACHIAN INSURANCE COMPANY, a Rhode Island corporation, CITY OF MIAMI, VERNON HETHERINGTON, FOWLER, WHITE, BURNETT, HURLEY, BANICK & KNIGHT, P.A. a/k/a FOWLER, WHITE, BURNETT, HURLEY, BANICK & STRICKROOT, P. A., a Florida professional association, PHILLIP W. KNIGHT, and MICHAEL J. MURPHY,

Respondents

PETITIONER'S REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Miriam Donner,
in proper person
P. O. Box 1232
Hallandale, Fla. 33008

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18 U.S.C. § 1964(c) 19

18 U.S.C. § 1983 . . . . . passim

28 U.S.C. § 1257(a) 10

Sup. Ct. R. 15.1 1

Sup. Ct. R. 15.2 1

Sup. Ct. R. 24.2 1

§ 90.201(1), Fla. Stat. 11

Fla. R. App. P. 9.040(e) 14

Fla. R. App. P. 9.210 (b) 14

Fla. R. App. P. 9.210 (c) 14

Fla. R. App. P. 9.210 (d) 14

Fla. R. Civ. P. 1.190(d) 9

Fla. R. Civ. P. 1.530(b) 13

ARGUMENT

This reply addresses new matters raised in response to Donner's Petition.

Contrary to the requirements of Sup. Ct. R. 15.1, 15.2, and 24.2, respondents include in their response a 10-page Statement of the Case that fails to specify "any perceived misstatements of fact" or "any inaccuracy or omission in the [petitioner's] statement" of the case and is in fact devoid of any reference to petitioner's Statement of the Case. Rather, their statement of the case and argument are permeated with misstatements of fact, not supported by the record below, calculated to malign Donner and to trivialize the federal issues sub judice.

For example, at pages 3-4 of their brief and without support in the record below, respondents cite as fact a skewed version of events leading up to Donner's arrest -- that she allegedly "instructed"

Hetherington to arrest her, etc. The only references in the record below to events leading to the arrest are in the complaint. Since the text of that complaint is set out in the appendix to respondents' brief (Resp. Br. A-1-21), the Court may readily verify that the complaint does not allege respondents' version of events to be true.[1]

At pages 7, 8, 33, and 43 of respondents' brief, again without any support in the record below, respondents charge Don-

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[1] Paragraph 16(iv) of the complaint specifically points out that, in Case No. 76-8301, Donner testified "that Hetherington arrested her immediately without any probable cause and that she did not state that she wanted to be arrested." (Resp. Br. A-13) The complaint further alleges that, among the fraudulently withheld and concealed records were Officer Hetherington's and Sergeant Parker's original written statements, conspicuously omitting any allegation that Donner had expressed a desire to be arrested and confirming that arresting Officer Hetherington made the arrest immediately upon his arrival (without any interval of prearrest observations). [Resp. Br. A-10, para. 9(b)(ii)].

ner with "obstreperous" litigation misconduct, delaying tactics, and abuses of the judicial process in Case No. 76-8301. Ironically, they cite only, and mistakenly rely upon, Donner v. Hetherington, 376 So.2d 404 (Fla. Dist. Ct. App. 1979), an appellate reversal in Donner's favor, holding that Donner did not disobey any court order.[2],[3] To the contrary, the complaint charges the delay to respondents'

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[2] Respondents' misstatement of the history of Case No. 76-8301 extends as well to their footnote 4. There they incorrectly state that "the case was previously disposed of by way of summary judgment" and that the judgment was reversed in Donner v. Hetherington, 370 So. 2d 1225 (Fla. Dist. Ct. App. 1979). That later-reversed judgment was in favor of just one of the Dade County officers.

[3] Respondents' footnote 6 also misrepresents that Donner is not seeking damages for the "post-arrest" conditions of her incarceration. To the contrary, among the items of damage alleged in her complaint is the diminution of the verdict against Dade County and its correctional officers caused by the unavailability to her at trial of the fraudulently withheld records. (Resp. Br. A-15-16, para. 19-21).

misconduct (Resp. Br. A-6 to A-20). Rather than disputing those charges, the decision below explicitly refrained from passing judgment on which party was at fault for Case No. 76-8301's extraordinary sixteen-year delay.[4]

At page 47 of their brief, respondents grossly distort, and attempt to trivialize, the complaint's detailed charges of respondents' course of fraudulent misconduct by misrepresenting that

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[4] The complaint's charge, that respondents were guilty of dilatory misconduct, is reinforced by respondents' concession, at page 9 of their brief, that, in response to a writ of mandamus awarding access to those public records, "the requested records were" (first) "produced on August 19, 1985." They conveniently skip over the complaint's allegations that pretrial discovery orders entered in 1978 had long since mandated production of those records and that in 1976-1978 they had previously misrepresented those records to be non-existent. Instead, at pages 8-9 of their brief, they seek to excuse the delay by referring to their objections to access to public records (interposed and overruled in that mandamus proceeding instituted years later in 1981).

> ... the only thing that the complaint alleges is that the INITIAL DEFENDANTS and THE ATTORNEYS answered interrogatories and requests for production which answers the Petitioner alleges were untrue, and hindered her ability to win her case.

This same pattern of misrepresentation is also evident at page 27 of respondents' brief. There, they assert that the term, "under color of state law," appearing in the complaint, is "primarily addressed to the conduct which gave rise to the initial litigation." Not so. Paragraphs 8, 16(vi), 22(a), and 24 of the complaint each allege that the acts of misconduct that gave rise to the claims sub judice were "under color of state law."[5]

A. THE JUDGMENT IS FINAL

At page 12 of respondents' brief, they concede that the Third District based its affirmance of the dismissal with prej-

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[5] That term is used to describe "conduct which gave rise to the initial litigation" only in para. 3 of the complaint.

udice upon an immunity for conduct in litigation but in the very next breath they attempt to qualify that affirmance by stating that the Third District

> "...invit[ed] the Petitioner to amend her complaint in the original 1976 litigation to seek redress for her grievances in connection with the discovery and other litigation conduct which took place in that 1976 proceeding."

That false interpretation of the affirmance resurfaces again at pages 31-32 of respondents' brief, where respondents state that the Third District ruled

> "... if, the Petitioner does or may have a cause of action, state or federal, that it is properly brought in the initial 1976 litigation where the alleged misconduct occurred."

To the contrary, the very first paragraph of the Third District's opinion clearly states that the dismissal with prejudice is affirmed and footnote 3 to that opinion merely adds:

> "Our affirmance should not be read to bar Ms. Donner from seeking to amend her complaint pending in the circuit court ..."

Nowhere in that footnote did the Third District suggest what manner of claim might be pled by way of amendment in Case No. 76-8301, much less that Donner had carte blanche to propose an amendment -- cancelling out the effect of its "affirmance" of the dismissal "with prejudice" and of its ruling that the complaint "failed to state a cognizable claim" -- by repleading "a cause of action, state or federal," for the very same litigation misconduct that (respondents concede) the Third District had held to be immunized. (See also discussion at footnote 15 of the Petition for Writ of Certiorari).

Respondents further compound their confusion by advancing, at page 33 of their brief, the following second alternative theory:

> "The District Court must have determined that any federal question ... was not properly brought procedurally. Said cause of action, if any, must be brought in the 1976 litigation by way of an amended complaint."[6]

That second theory is manufactured out of whole clothe. Respondents have cited no supporting Florida or federal authority -- in support of their novel theory that the Third District determined that, "procedurally," the federal causes of action are uniquely required to be pled in Case No. 76-8301. Indeed, no such peculiar

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[6] That second theory, limited to just federal causes of action, diverges from respondents' first theory, quoted ante, that the Third District ruled that Donner's "cause of action, state or federal, ... is properly brought in the initial 1976 litigation ..." (Emphasis added). Nowhere in that opinion can one decipher any language hinting that either the Third District's affirmance of the blanket dismissal with prejudice or its ruling that "the complaint ... failed to state a cognizable claim" drew any distinction between the state-law-based claims and the federal claims pled in the complaint.

authority exists.[7]

These conclusions are supported by the motion for clarification filed in the court below by respondents (appellees) Appalachian, et al. (and reproduced in the appendix, post). In that motion, respondents reported their "understanding" to be that footnote 3 to the Third District opinion

> "...is not to be construed as granting leave ... to amend ... to sue the attorneys involved in the previous lawsuit for a cause of action arising out of statements or writings alleged to have occurred during the course of the previous judicial proceedings."

Respondents' argument that said foot-

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[7] Fla. R. Civ. P. 1.190(d) provides only that, "upon such terms as are just," upon motion of a party "the court may permit him" to serve a "supplemental pleading setting forth transactions or occurrences ... which have happened since the date of the" original complaint. Neither that rule nor any other mandates that a cause of action arising out of occurrences subsequent to the original complaint be added as a supplemental pleading rather than being pled in a separate suit.

note 3 renders the affirmance not a "final" judgment within the meaning of 28 U.S.C. § 1257(a) is thus without merit.

B. THE FEDERAL QUESTIONS WERE PRESERVED FOR REVIEW

On the issue of whether Donner preserved the federal questions at the Florida state court level for review by this Court, respondents ignore Street v. New York, 394 U.S. 576 (1969) and instead cite several older cases. The only one of those citations meriting discussion is Bowe v. Scott, 233 U.S. 658 (1914).

In Bowe, a Virginia state trial court dismissed a bill for failure to state a cognizable claim. On appeal, plaintiffs omitted any federal question from their assignments of error. The dismissal was affirmed without mention of a federal question. In that appeal, the petition for rehearing, citing the federal question, was denied without addressing that federal question. The attempt to seek review in

the U.S. Supreme Court was dismissed, in the absence of a federal question.[8]

The case at bar is readily distinguishable from Bowe, 233 U.S. 658. Donner's Petition, at pages 24-26, discusses the Florida cases and statute[9] that require Florida courts, in ruling upon a motion to dismiss a complaint for failure to state a cognizable claim, to take judi-

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[8] In Bowe the bill contained a merely conclusory allegation that a city ordinance conflicted with section 10, article I, of the U.S. Constitution. Though the bill claimed the ordinance impaired the obligation of a contract to which one Shafer was a party, the bill failed to allege that plaintiffs were in privity with Shafer. The bill's reference to due process violations could have been referable to state, not federal, due process guarantees. After the trial court decided the case, the motion for leave to amend the bill again failed to articulate a claimed federal right.

[9] City of Lakeland v. Select Tenures, Inc., 176 So. 274,277 (Fla.1937); Vance v. Indian Hammock Hunt & Riding Club, 403 So. 2d 1367,1369 (Fla.Dist.Ct.App.1981); Sec. 90.201(1), Fla.Stat.; Pizzi v. Central Bank & Trust Co.,250 So.2d 895 (Fla.1971); Lytell v. McGahey Chrysler-Plymouth, Inc., 180 So.2d 354,355 (Fla.Dist.Ct.App. 1965).

cial notice of the federal statutes applicable to the ultimate facts pled therein without any need to plead the statutory citations; no comparable Virginia state court authorities were noted in Bowe.[10] In contrast to the defective allegations of Bowe's bill, complaint alleges ultimate facts, constituting the elements of § 1983 and RICO claims, and additionally employs "words of art" peculiar to such claims.[11]

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[10] The later decision of Street v. New York, 394 U.S. at 581-584 looked to New York state law on the issue of whether the federal question had been preserved at the New York state trial court level.

[11] Paragraphs 8, 16(vi), 22(a), and 24 of the complaint allege respondents' misconduct was "under color of state law" in furtherance of "a conspiracy" to which the City, its attorneys, and its insurer were parties. Paragraph 30 alleges that the said misconduct damaged Donner's pending "civil rights" claims and paragraph 3(a) alleges that those civil rights claims involved violations of "First Amendment rights to picket." Paragraph 8 alleges that the "pattern of fraudulent misrepresentation" was accomplished "in conspiracy with one another" via "service by mail of papers through the U.S. Postal Service."

Secondly, within the ten days allowed for motions for rehearing under Fla.R.Civ. P. 1.530(b), Donner filed a motion for rehearing and addendum thereto (reproduced in the appendix to respondents' brief), redirecting the trial court's attention to the fact that her complaint pled

> "... an action under 18 U.S.C. Sec. 1964 (c) (Civil RICO), based upon defendants' alleged use of the mails in furtherance of their alleged pattern of conduct" and
>
> "... a cause of action under 42 U.S.C. Sec. 1983."

(Resp. Br. A-29, 32). Douglas v. Alabama, 380 U.S. 415, 422 (1965) holds:

> ... an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests, and therefore sufficient to preserve the claim for review here.

Donner's motion for rehearing and addendum likewise brought the "federal error to the attention of the trial court" in ample time for the trial court "to take appro-

priate corrective action" and therefore should stand on the same footing as the timely "objection" approved in Douglas. That is distinguishable from Bowe's earlier holding that, at the appellate level, a federal question raised for the first time by petition for rehearing came too late.

Lastly, in contrast to the assignments of error required in Virginia when Bowe was decided, Fla. R. App. P. 9.040(e) provides that, on appeal, "[a]ssignments of error are neither required nor permitted." Fla. R. App. P. 9.210 (b), (c), and (d) require only that the issues be briefed. Donner timely and fully briefed those federal questions as issues on appeal.

C. THE COMPLAINT ALLEGES A COGNIZABLE SEC. 1983 CLAIM

On the issue of whether the complaint states a § 1983 claim, respondents' efforts (at page 44 of their brief) to distinguish Ryland v. Shapiro, 708 F.2d 967 (5th Cir. 1983) are misdirected. They mis-

takenly argue that "the plaintiff in Ryland did not bring any cause of action for wrongful death whatsoever" as a result of defendants' misconduct. The Rylands' complaint alleged rather that the filing of Rylands' wrongful death action was "delayed" (just 11 months), not foreclosed, by defendants' misconduct. Ryland, 708 F. 2d at 972-975 expressly recognizes a constitutional right of "meaningful" access to the courts and a § 1983 claim for litigation-delay-induced damages caused by wrongful conduct under color of state law.

Equally misdirected is respondents' effort to distinguish Harrison v. Springdale Water & Sewer Commission, 780 F.2d 1422 (8th Cir. 1986). In Harrison, the Eighth Circuit likewise recognized, and approved Harrison's § 1983 claim for "infringement" of, his constitutional right of access to the courts. Harrison's access to the court was interfered with, not

foreclosed, by the Commission's retaliatory counterclaim. Harrison, 780 F.2d at 1428 n.9 cites with approval Silver v. Cormier, 529 F.2d 161 (10th Cir. 1976), holding such interference actionable even though "not actually effective." It makes no difference, substantively, whether that "interference" is caused by retaliatory misconduct as in Harrison or by defendants' "fraudulent" misconduct here at issue.

At pages 48-49 of their brief, respondents mistakenly state that the complaint charges damage to just one federal right, Donner's access to the courts; they overlook the fact that the complaint also charges damage to a second federal right: her § 1983 "civil rights actions" pled in Case No. 76-8301.[12]

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[12] Case No. 76-8301 involved Sec. 1983 damage claims for the misconduct of the City and County and their personnel "under color of state law" that infringed upon Donner's "civil rights" (her "First Amend-

On the issue of privilege, it is significant to note that respondents cite not a single pre-1871 case, much less a pre-1871 case recognizing a common-law privilege in a context similar to the facts alleged in the complaint at bar. Respondents' oldest cited case is Meyers v. Hodges, 44 So. 357 (Fla. 1907); Meyers is distinguishable because it applied a privilege only in an action for defamation.

D. THE COMPLAINT ALLEGES A COGNIZABLE RICO ACTION

Respondents' attempted analysis of Donner's RICO claim is also replete with error. At pages 39-41 of their brief, they preface their analysis with a false assumption, that RICO applies only to organized crime. Then they shift ground by arguing that RICO applies just to crimes

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ment rights to picket" and "petition" and her Fourteenth Amendment rights not to be "falsely arrested" and not to be subject to cruel and inhumane conditions of imprisonment).

"traditionally considered criminal in nature" and on that basis seek to distinguish U.S. v. Vaughan, 797 F.2d 1485 (9th Cir. 1986) and U.S. v. Peters, 732 F.2d 1004 (1st Cir. 1984). That narrow construction of RICO was rejected in H.J. Inc. v. Northwestern Bell Tel. Co., 109 S.Ct. 2893, 2903 (1989). So confused are respondents that they mislabeled Peters, 732 F.2d 1004 as a RICO action. Rather, Peters affirmed a mail fraud conviction. One count of that conviction was for mailing fraudulent answers to interrogatories in civil litigation.[13]

Respondents erroneously argue that

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[13] Respondents cite an alternative holding in "Spiegel v. Continental Illinois National Bank, 609 F.Supp. 1083 (D.C. Ill. 1985)," exempting attorneys from "mail fraud" for litigation-related correspondence, but they fail to cite that case's subsequent history; on appeal, at 790 F.2d 638, 649 n.11 (7th Cir. 1986), cert. denied, 479 U.S. 987 (1986), it was held that there was no fraud, so that the said lower-court, alternative holding was superfluous.

the complaint does not allege damage to "business or property" under 18 U.S.C. § 1964(c). That wording is modeled after 15 U.S.C. § 15, Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 485 (1985). Reiter v. Sonotone Corp., 442 U.S. 330, 337-342 (1979) read the word "property" in § 15 expansively and refused to restrict it just to "commercial" property. Grogan v. Platt, 835 F.2d 844 (11th Cir. 1988), upon which respondents rely, noted a distinction between "property" and "person" and disallowed a RICO personal injury claim for wrongful death. By contrast, the complaint at bar seeks compensation for damage to Donner's "rights of action" pled in Case No. 76-8301 -- separate and distinct from the underlying personal injuries upon which those rights of action are grounded.[14] Those "rights of action" are

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[14] Grogan would bar RICO damages only for Donner's mental anguish and headaches allegedly caused by the litigation delays.

"property." Ryland, 708 F.2d at 972-973, held a wrongful death action to be "property" under the due process clause, and cited Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1982) ("The hallmark of property ... is an individual entitlement grounded in state law, which cannot be removed except 'for cause'"). Logan, at 428, n. 4, cites Martinez v. California, 444 U.S. 277, 281-282 (1980), postulating "a state tort claim" as "property." Another section of RICO, 18 U.S.C. § 1963 (b)(2), likewise refers to "property" as including "rights" and "claims."

Miriam Donner

MIRIAM DONNER, Petitioner

NO. 91-1227

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

MIRIAM DONNER,

Petitioner,

vs.

APPALACHIAN INSURANCE COMPANY, a Rhode Island corporation, CITY OF MIAMI, VERNON HETHERINGTON, FOWLER, WHITE, BURNETT, HURLEY, BANICK & KNIGHT, P.A. a/k/a FOWLER, WHITE, BURNETT, HURLEY, BANICK & STRICKROOT, P. A., a Florida professional association, PHILLIP W. KNIGHT, and MICHAEL J. MURPHY,

Respondents

APPENDIX TO PETITIONER'S REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI

IN THE DISTRICT COURT
OF APPEAL OF FLORIDA
THIRD DISTRICT
CASE NO: 90-1222

F.B.N. 331902

MIRIAM DONNER,

Appellant,

-V-

APPALACHIAN INSURANCE COMPANY, a Rhode Island corporation, CITY OF MIAMI, VERNON HETHERINGTON, FOWLER, WHITE, BURNETT, HURLEY, BANICK & kNIGHT, P.A. a/k/a FOWLER, WHITE, BURNETT, HURLEY, BANICK & STRICKROOT, P.A., a Florida professional association, PHILLIP W. KNIGHT, and MICHAEL J. MURPHY,

Appellees
_____/

MOTION FOR CLARIFICATION OF DECISION

COME NOW the Appellees, APPALACHIAN INSURANCE COMPANY, a Rhode Island corporation, FOWLER, WHITE, BURNETT, HURLEY, BANICK & kNIGHT, P.A. a/k/a FOWLER, WHITE, BURNETT, HURLEY, BANICK & STRICKROOT, P.A., a Florida professional association, PHILLIP W. KNIGHT, and MICHAEL J. MURPHY,

and pursuant to Rule 9.330, Florida Rules of Appellate Procedure, respectfully file this Motion For Clarification Of Decision of the Honorable Court dated May 7, 1991 and would state:

1. In the Appellate decision, the Honorable Court affirmed the Trial Court's Order Dismissing Plaintiff's Complaint With Prejudice holding that the Complaint failed to state a cognizable claim.

2. Note 3 to the decision states:

> Our affirmance should not be read to bar Ms. Donner from seeking to amend her Complaint pending in the Circuit Court or from asking the Trial Court to impose sanctions against the Defendants for their alleged misconduct in the discovery proceedings.

3. It is Appellee's understanding that note 3 is not to be construed as granting leave for Appellant to file an Amended Complaint or a Motion for

Sanctions in the same action in which the Complaint at bar was filed and from which this appeal was taken (Case No: 89-37625 CA17). It is Appellee's understanding that note 3 is simply stating should Ms. Donner seek to move the trial court to impose sanctions, such Motion to Amend or Motion to Impose Sanctions are to be filed in Case No: 76-8301 which is presently pending in the Eleventh Judicial Circuit in and for Dade County, Florida. Whether or not an Amended Complaint states a cognizable claim or whether or not any Motion for Sanctions should be granted will then be ruled upon by the trial court.

4. It is also Appellees understanding that note 3 is not to be construed as granting leave to the Appellant to amend her Complaint to sue the attorneys involved in the previous lawsuit for a

cause of action arising out of statements or writings alleged to have occurred during the course of the previous judicial proceedings. The holding of the Honorable Court's decision of May 7, 1991 is that statements or writings alleged to have been made by attorneys during the course of judicial proceedings enjoy absolute immunity and cannot be the basis of a cause of action.

5. In an abundance of caution, and to avoid any confusion, Appellees respectfully request the Honorable Court for an Order clarifying note 3 of the Court's Decision file May 7, 1991.

IT IS HEREBY CERTIFIED that a true and correct copy of the foregoing motion was mailed this 14th day of May, 1991 to: MARK A. TROP. ESQUIRE, Attorney for Appellant, Baypoint Suite 830, 4770

Biscayne Boulevard, Miami, Florida 33137 and DAVID KLEINBERG, ESQUIRE, Attorney for City of Miami and Hetherington, 4601 Ponce de Leon Boulevard, Suite 100, Coral Gables, Florida 33146.

Respectfully submitted,

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